MISSISSIPPI
FAMILY LAW

CONTINUING LEGAL EDUCATION

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FAMILY LAW DEVELOPMENTS
2019

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I. GROUNDS FOR DIVORCE

A. Adultery

Bradshaw v. Bradshaw, No. 2017-CA-01731-COA, 2019 WL 3815548 (Miss. Ct. App. Aug. 13, 2019). A chancellor erred in finding that a woman's invocation of the Fifth Amendment in response to questions about adultery was clear and convincing evidence that she committed adultery. A chancellor may draw an adverse inference from a defendant's invocation of the Fifth Amendment which, combined with other evidence, may prove divorce. However, divorce may not be granted based on the inference alone. In this case, sufficient evidence was introduced to prove adultery. The woman's husband and son testified that she left home on Friday nights and did not return until early morning. In addition, her husband testified that she admitted having been with other men.

B. Habitual, cruel, and inhuman treatment

Anderson v. Anderson, 266 So. 2d 1058 (Miss. Ct. App. 2019). A chancellor did not err in granting a wife divorce based on habitual, cruel, and inhuman treatment. She testified to multiple instances of physical violence by her husband, including one in which he punched her in the head, causing temporary hearing loss. Her mother and son corroborated her testimony. The court rejected her husband's argument that her single incident of adultery – rather than his abuse — caused the end of their marriage. The chancellor properly found that the husband's abuse before and during the marriage was the cause of the marriage breakdown. Even if both parties prove grounds, only one spouse may be granted a divorce.

Johnson v. Johnson, 281 So. 3d 70 (Miss. Ct. App. 2019). The court of appeals affirmed a chancellor's grant of divorce to a wife based on habitual, cruel, and inhuman treatment. She testified that her husband was jealous and suspicious and repeatedly accused her of infidelity, to the point that she could not speak to other men. Four years prior to their separation, he physically abused her, causing bruises. He once threatened to kill her and burn their house down. He broke furniture in a rage and cursed her. Her testimony was corroborated by her sister and a friend who saw the plaintiff's bruises and observed the husband's controlling behavior. The court of appeals agreed that the wife's testimony showed a pattern of abuse that supported divorce based on habitual cruelty.

Littlefield v. Littlefield, 282 So. 3d 820 (Miss. Ct. App. 2019). A wife of five years was properly granted divorce based on habitual, cruel, and inhuman treatment. She testified that her husband regularly yelled at her, called her "stupid," told her she was going to hell, used scripture to intimidate her, limited her phone conversations, threatened to hurt her pets, and berated her about her clothing. He made unfounded accusations of her adultery to her friends at church and called her a "whore". On one occasion, he appeared to threaten suicide, prompting her to call a friend to remove weapons from their house. When she returned to their home to retrieve personal belongings, he physically prevented her from leaving the house. He also located her new apartment and appeared there late at night. Her mother testified that her son-in-law was controlling and unpredictable, that she was afraid for her daughter's safety, and that her daughter's personality had changed from outgoing to depressed and withdrawn. The court of appeals agreed that the wife presented sufficiently corroborated evidence to prove the ground by a preponderance of the evidence. The court noted that corroborating testimony need not be sufficient in itself to prove the ground, only sufficient for the court to conclude that the petitioner's testimony is true.

Bradshaw v. Bradshaw, No. 2017-A-01731-COA, 2019 WL3815548 (Miss. Ct. App. Aug. 13, 2019). The court rejected a wife's argument that she was entitled to divorce based on habitual, cruel, and inhuman treatment because of her husband's "unnatural and infamous" conduct. She testified that he was distant and inattentive and would sometimes "give her the silent treatment" for weeks at a time. In addition, he left their home for three months early in their long marriage and sometimes left for a weekend when their son was young. She also testified that on several occasions when she was hospitalized he visited her only briefly. The court of appeals held that his conduct did not rise to the level required for habitual cruelty, which requires more than "mere unkindness." The court noted that the "unnatural and infamous" type of habitual cruelty does not require a finding that the plaintiff was in danger.

C. Spousal domestic abuse

In 2017, the Mississippi legislature amended the fault-based divorce grounds statute, Miss. Code Ann. § 93-5-1. The definition of habitual, cruel, and inhuman treatment now explicitly includes a subset of habitual cruelty – spousal domestic abuse.

Domestic abuse may be proved by evidence of physical abuse or threats of abuse - "[t]hat the injured party's spouse attempted to cause, or purposely, knowingly or recklessly caused bodily injury to the injured party, or that the injured party's spouse attempted by physical menace to put the injured party in fear of imminent serious bodily harm." Spousal domestic abuse may also be proved by a pattern of behavior "of threats or intimidation, emotional or verbal abuse, forced isolation, sexual extortion or sexual abuse, or stalking or aggravated stalking as defined in Section 97-3-107, if the pattern of behavior rises above the level of unkindness or rudeness or incompatibility or want of affection." *Id.*

The amendment does away with the need for corroborating evidence, providing that domestic abuse may be established by the testimony of one witness, including the injured party.

Wangler v. Wangler, No. 2018-CA-01632-SCT, 2020 WL 1181377 (Miss. March 12, 2020). A wife filed for divorce on the basis of habitual, cruel, and inhuman treatment after separating from her husband of one year. She sought to amend the complaint to allege spousal domestic abuse the day before trial. The chancellor denied her motion to amend and found that she did not prove habitual cruelty. The supreme court held that an amendment was not necessary because her allegation of grounds included spousal domestic abuse, which is a form of habitual cruelty. However, the court held that she failed to prove grounds under either. The wife testified that the husband deprived her of sleep several nights a week with arguments and criticism that stretched into the night. The court noted, however, that it was not clear whether the lack of sleep was caused by her husband or by caring for their newborn. She alleged that he tried to isolate her and control her communication with family, sometimes taking her cellphone or keys and once cutting off the internet to prevent her from contacting them. However, the court found that she talked with her mother several times a week and her mother visited her once a week. His accusations of infidelity toward the end of their relationship did not arise to the level of constant and long-term accusations that constitute habitual cruelty. She testified that if she was not ready to go to bed when he was, he would sometimes physically pick her up and force her to go to bed. However, the court noted that she testified this only happened every four to six weeks. In addition, the court noted that despite her testimony, she accompanied her husband on a trip to interview for a pastorship on three occasions in the four months before they separated and planned to move with him. The evidence also showed that during their short marriage she posted positive comments about her husband on social media. Citing cases discussing the traditional ground of habitual, cruel, and inhuman treatment, the court agreed that the wife's evidence amounted to "nothing more than unkindness, rudeness, incompatibility, and/or want of affection" under the spousal domestic abuse ground. Two justices dissenting, arguing that the husband's controlling conduct had a serious impact on the wife and should be sufficient to constitute spousal domestic abuse.

II. DOMESTIC VIOLENCE

Alexis v. Black, 283 So. 3d 1105 (Miss. 2019). The supreme court affirmed a circuit court's denial of a permanent protection order even though the defendant's conduct met the definition of physical abuse under the statute. The petitioner and defendant lived together from August of 2016 to January of 2018. According to her, during an argument in September of 2017, he punched her in the face with his fist, causing a burning sensation in her jaw. He testified that he slapped her lightly on the jaw and cheek. She also testified that after the altercation, she gave him time to move. When he did not vacate in spite of multiple deadlines to do so, she filed a petition for a protection order. By both of their accounts, they lived together in the one-bedroom apartment amicably for four months until he moved after the filing. The couple had no contact after a temporary order of protection was entered except for the removal of his items from the apartment. The trial court denied her request for a permanent order of protection, finding that the altercation was "a one-time incident" that did not rise

to the level of domestic abuse. The judge also stated that he did not find that the petitioner was in fear of the defendant.

The supreme court disagreed with the court, holding that a single, even "minor" incident of physical abuse meets the definition of abuse under the protection order statute. The statute, MISS. CODE ANN. § 93-21-15(2)(a), provides that abuse may include "*one or more*" listed acts, including "attempting to cause or intentionally, knowingly or recklessly causing bodily injury." The supreme court looked to the Model Penal Code definition of bodily injury as "physical pain" and Black's Dictionary definition as "physical damage to a person's body." The petitioner's testimony that she suffered a burning sensation in her jaw as a result of the defendant's conduct was sufficient evidence to prove that the defendant caused her bodily injury. A traumatic injury is not required. Nonetheless, the judge did not abuse his discretion in determining that an order was not required. If a petitioner proves abuse, a court "shall be empowered" to grant a protection order "to bring about a cessation of abuse." MISS. CODE ANN. § 93-21-11. The judge found that an order was not required, based on evidence that the couple lived together without incident for four months, that the defendant had not contacted her since moving out, and considering the court's belief that she did not fear the defendant.

Waite v. Adkisson, 282 So. 3d 744 (Miss. Ct. App. 2019). A chancellor erred in awarding injunctive relief under Miss. R. Civ. P. 65 to a petitioner seeking an order of protection from domestic abuse. Rule 65 is a procedural rule that allows a court to provide injunctive relief to protect a separate right. It does not provide authority to award freestanding injunctive relief apart from some independent right. While the domestic abuse protection statute provides an independent right, it includes its own statutory scheme for injunctive relief. The case was reversed and remanded for the chancellor to determine whether the petitioner met her burden of proving by a preponderance of the evidence that she was entitled to relief under the domestic abuse protection order statute.

Warner v. Thomas, 281 So. 3d 216 (Miss. Ct. App. 2019). A chancellor properly denied a mother's petition to modify joint legal custody, filed four months after the original decree. She described an incident at the child's basketball game in which the joint custodial father cursed at her, attempted to strike her, and instead struck the child. The father's testimony directly contradicted the incident. No other adult witnessed the confrontation and no impartial witnesses testified. Even though the mother obtained a temporary order of protection, the chancellor properly found that the incident did not constitute a "history of family violence" that would create a presumption against custody to the father. A history of family violence is defined as a pattern of violence or a single incident that causes serious injury.

Wilson v. Wilson, 283 So. 3d 195 (Miss. Ct. App. 2019). A chancellor properly granted a former wife's motion for summary judgment in an action for injunction by her former husband and his current wife. In May of 2017, the couple sought injunctive relief, alleging that the former wife had harassed them over the last eighteen months. The evidence showed a series of Facebook posts and texts in early 2016 that showed the former wife's unhappiness about the marriage breakup. In February 2016, she left

a note on the door of her former husband and his new wife's house, saying that she once hoped to purchase the house herself. They also alleged that she regularly drove by their house. However, the incident that prompted the filing was in May 2017, when the former wife was parked on Main Street 500 feet from their house – according to her, looking for an address. The current wife confronted her. The former wife left and called her sister, who subsequently went to the plaintiffs' business and engaged in a physical altercation with the current wife. The court of appeals agreed with the chancellor that there was no evidence that the plaintiffs faced an imminent threat of irreparable harm from the former wife. The Facebook posts were remote, the road on which they lived was a main thoroughfare by which the former wife reached downtown Natchez, and the May 2017 confrontation did not involve the former wife.

III. ALIENATION OF AFFECTION

Long v. Vitkauskas, 287 So. 3d 171 (Miss. 2019). The supreme court affirmed a chancellor's dismissal of an alienation of affection suit for lack of personal jurisdiction over the defendant. The plaintiff and his wife lived in Olive Branch, Mississippi. The wife worked in Memphis, Tennessee. After the couple divorced, the former husband sued Vitkauskas, his former wife's supervisor, for alienation of affection, alleging that he conducted an affair with his wife during the marriage. Vitkauskas filed a motion to dismiss for lack of personal jurisdiction. At the hearing to dismiss, Long's attorney informed the court that the evidence, including Long's testimony, phone logs, and the wife's journal, would show the defendant's contacts with the wife in Mississippi. A log of the phone calls and texts was entered into evidence, but the other items were not. The trial court granted the defendant's motion to dismiss, finding that the only evidence submitted was a log of calls and texts to the wife's Memphis number, which did not establish that the defendant purposefully engaged in conduct in Mississippi.

The supreme court affirmed. Personal jurisdiction requires proof that a defendant purposefully engaged in contacts within the state, so that the person could reasonably suspect his actions would allow him to be "haled into court" in Mississippi. Nothing in the record showed Vitkauskas had purposefully made contacts in the state. The action was properly dismissed without prejudice.

IV. PROPERTY DIVISION

A. Classification

1. Findings of fact

Littlefield v. Littlefield, 282 So. 3d 820 (Miss. Ct. App. 2019). A chancellor was not required to make findings of fact classifying a couple's assets as separate or marital. The wife, who was granted a divorce based on habitual cruelty, waived her claim to all assets with the exception of a few items of personal property. The court awarded her those items and her car, on which she had made all the payments. Her husband was awarded his car and all other items. Because she waived her claim to

most items, there was no need to classify assets as marital or separate.

2. Separate property

Crew v. Tillotson, 282 So. 3d 776 (Miss. Ct. App. 2019). A husband's business was properly classified as a nonmarital asset. During their marriage, the husband's father gave the husband and his brother each a one-third interest in TEI Corporation, which held title to farmland. The father and brother later experienced financial difficulty and surrendered their TEI stock to the husband. The husband and wife owned a farming operation, E & L Plantation, which leased land from TEI for its farming operations. The chancellor found, based on the testimony of the husband and others, that the father intended to make a gift of the TEI stock to his sons. The husband paid no compensation for his interest in the company. The chancellor also found that assets of TEI were purchased with rental income or separate loans on which the wife was not liable, that TEI funds were not converted to marital by commingling, that no marital assets were used to support the business, and that the wife did not contribute to the business. The court of appeals affirmed the chancellor's finding that TEI was the husband's separate property.

Williams v. Williams, 264 So. 3d 722, 729 (Miss. 2019). A chancellor did not err in classifying a boat and airplane as marital, in spite of the wife's testimony that she purchased them with funds that her mother provided to her. She did not call her mother to testify regarding the gift. The wife's daughter testified that her mother initially told her that she purchased the boat and airplane herself. The daughter also stated that her grandmother did not have significant funds with which to make a major purchase.

Ellison v. Williams, 282 So. 3d 447 (Miss. Ct. App. 2019). A chancellor did not err in refusing to classify $35,000 provided to a wife by her son from another marriage as a marital debt as the wife requested. There was testimony that she worked for her son part time and that she reported the funds to the IRS as income.

B. Commingling - tracing

Bradshaw v. Bradshaw, No. 2017-CA-01731-COA, 2019 WL 3815548 (Miss. Ct. App. Aug. 13, 2019). A chancellor properly classified a husband's inherited rental property as separate, even though the rent was deposited into a joint account and insurance and taxes on the property were paid from that account. The rent was sufficient to cover the expenses paid from the account and the funds were "readily traceable." Nor did the wife's minimal efforts of cleaning the rental property require that it be classified as marital.

C. Valuation

Alford v. Alford, No. 2017-CA-01075-COA, 2019 WL 3297142 (Miss. Ct. App. July 23, 2019), *rev'd in part on other grounds,* No. 2017-CT-01075-SCT (Miss. June 4, 2020). A chancellor properly valued a husband's twenty-five percent interest in a farming operation based on the wife's expert's testimony. The expert used the net

asset approach to valuation. He testified that other methods of valuation include goodwill, a measure of value not permitted in divorce actions in Mississippi. The court also rejected the husband's argument that the court should have used a lack-of-marketability discount in light of his minority interest. The expert testified that while a discount might be appropriate in a valuation based on other methods, it was not appropriate in a net asset valuation.

Chism v. Chism, 285 So. 3d 656 (Miss. Ct. App. 2019). The court of appeals reversed and remanded a chancellor's valuation of a couple's business that was their primary asset and source of support. The couple built the successful Memphis chicken wing and catfish restaurant during their marriage. Both worked in the business. The only evidence of the business' value was the wife's estimate that it was worth $1,000,000. She did not explain how she reached that figure. The husband presented no evidence of value. While he testified that his monthly net income was $5,400, his bank account for two months showed deposits between $20,000 and $30,000. There was also testimony that substantial cash income from the business was not reported. The chancellor valued the business at $1,000,000 and other marital assets at $176,598. The wife received $521,299 for her share of assets and $96,000 in lump sum alimony. In his post-trial motion to reconsider, the husband offered a business valuation expert's report that the business was worth $1,898 under the asset-based approach.

The court of appeals reversed, holding that there was insufficient evidence to support the valuation. The court distinguished cases in which estimates of value based on limited evidence have been affirmed. In this case, the business was the couple's main asset and the estimate of value was not supported by any explanation. The court stated, "the chancellor should require that the parties utilize a reliable method of valuation and support it with adequate proof, or prove valuation through expert testimony. If they fail to offer such proof, the chancellor may appoint an independent valuation expert."

Williams v. Williams, 264 So. 3d 722 (Miss. 2019). A chancellor did not err in relying on a husband's evidence to value the couple's business interests in a case in which the wife provided no evidence of value. Nor was the court required to appoint an expert in valuation. It is not the duty of the chancellor to obtain appraisals.

Kimble v. Kimble, 282 So. 3d 453 (Miss. Ct. App. 2019). The court of appeals affirmed a chancellor's valuation of three vehicles belonging to a husband, using the wife's values obtained from NADA websites. The husband testified that the vehicles had not been used in years and had no value. However, the wife's evidence showed that he had received tickets driving one of the vehicles. The chancellor found that the husband's testimony was not credible and that he had attempted to conceal assets and income.

D. Division of marital assets

1. Fault as a factor

Johnson v. Johnson, 282 So. 3d 738 (Miss. Ct. App. 2019). The court of appeals rejected a husband's argument that equal division of marital assets was improper because of his wife's extramarital affairs. The court below considered that the wife had two affairs but also found that the husband was physically and verbally abusive. The court found that neither "made a greater contribution to the harmony of the home than the other." One judge dissented, arguing that the chancellor mentioned the affairs but did not adequately consider the impact of the affairs on the marriage.

Ellison v. Williams, 282 So. 3d 447 (Miss. Ct. App. 2019). The court of appeals reversed and remanded a chancellor's award of sixty percent of marital assets to a wife, finding that the court failed to consider the husband's post-separation affair. In dividing their assets, the court granted the wife a greater share because one of their two homes had been her fully-paid premarital home. The chancellor did not directly address the impact of the husband's adultery and occasional absences from home on the stability and harmony of the marriage. The court reversed for the chancellor to consider the extramarital relationship's impact on the marriage. Four judges dissented, arguing that the decision should be affirmed since there was substantial evidence to support the decision. They pointed out that the final judgment did address adultery, granting a divorce on that ground, and that the wife was awarded a greater share of marital assets.

2. Award of marital home

Anderson v. Anderson, 266 So. 2d 1058 (Miss. Ct. App. 2019). A court properly awarded a wife/custodial parent possession of the marital home and ordered her husband to pay the mortgage, taxes, and insurance. The order provided that the couple could sell the home when the youngest child reached twenty-one or was emancipated, with the husband receiving two thirds of the equity in the home and the wife one third. The court of appeals rejected his argument that the award was error, noting that it is generally preferable to award the home to the custodial parent, and that a court may award possession to one spouse and order the other to make payments for a period of time.

3. Spouse's separate estate

Reynolds v. Reynolds, 287 So. 3d 1019 (Miss. Ct. App. 2019). The court of appeals affirmed a chancellor's division of assets and award of alimony to a wife of thirteen years. Both spouses contributed substantially to the accumulation of assets, the husband through working and the wife as a homemaker and through her employment as an LPN. The marital home included $40,200 of the husband's separate property and $8,400 in marital equity. The chancellor awarded the husband marital assets valued at $109,950 and ordered that he pay the $9,000 balance on the car awarded to the wife. The chancellor awarded the wife $106,900 in marital assets and $19,500 in lump

sum alimony in light of the disparity in their marital and separate estates. The court rejected the husband's argument that the wife was not entitled to a share of the marital home equity because she did not contribute financially to the home upkeep. She contributed as a homemaker and as a wage-earner. The award of lump sum alimony was appropriate in light of the fact that the husband received a larger award of the marital assets and had a separate property estate while the wife had none.

V. ALIMONY

A. Relationship to equitable distribution; findings of fact

Chism v. Chism, 285 So. 3d 656 (Miss. Ct. App. 2019). The court of appeals rejected a husband's argument that reversal was required because the court failed to make on-the-record *Armstrong* findings to support an alimony award. Although the chancellor did not analyze each factor, he did provide sufficiently detailed findings of fact to support the award. However, because property division was reversed, the court also reversed the chancellor's award of $96,000 in lump sum alimony to the wife.

B. Social Security benefits

Alford v. Alford, No. 2017-CA-01075-COA, 2019 WL 3297142 (Miss. Ct. App. July 23, 2019), *rev'd* No. 2017-CT-01075-SCT (Miss. June 4, 2020). The supreme court reversed the court of appeals' decision in this case, disagreeing with the court's interpretation of its recent decision regarding derivative Social Security benefits. The court of appeals had reversed a chancellor's award of alimony, instructing the chancellor to consider that the wife would soon receive Social Security benefits.

The couple divorced at sixty-three years of age after thirty-nine years of marriage. The chancellor awarded the wife $5,000 in monthly periodic alimony. Her husband had net monthly income of $8,070 and expenses of $3,109, while she had income of $1,516 and expenses of $6,376. She received assets of $713,123, including a mortgage-free home. He was awarded assets valued at $742,730. At trial, the parties and their attorneys assumed, based on then-current law, that when the wife began drawing Social Security benefits based on her husband's work history, her alimony would be reduced by that amount. However, the Mississippi Supreme Court subsequently overruled the dollar-for-dollar offset rule in *Harris v. Harris*, 241 So. 3d 622 (Miss. 2018). The supreme court in *Harris* held "Social Security benefits derived from the other spouse's income *do not* constitute a special circumstance triggering an automatic reduction in alimony. When a spouse receives Social Security benefits derived from the other spouse's income, the trial court must weigh all the circumstances of both parties and find that an unforeseen material change in circumstances occurred to modify alimony." *Id.* at 628. As the court of appeals read *Harris*, the husband would not be able to obtain a modification when his former wife began to draw benefits because the event was clearly foreseeable. The court of appeals remanded, holding that when receipt of Social Security is "clearly foreseeable," chancellors should consider those benefits in the initial alimony award.

On certiorari, the supreme court clarified that the foreseeability of Social Security benefits does NOT prevent modification of alimony. To so hold would prevent anyone from obtaining a modification in this circumstance, since it is foreseeable that most spouses will receive Social Security. *Harris* held instead that a chancellor must consider "whether all of the circumstances, including the impact the reception of derivative Social Security benefits had on both parties, constituted an unforeseen material change in circumstances." It is the impact of Social Security, not the receipt, which is not foreseeable at the time of divorce. Parties should seek modification at the appropriate time, rather than chancellors being required to speculate about future benefits.

C. Amount of award

Griner v. Griner, 282 So. 3d 1243 (Miss. Ct. App. 2019). The court of appeals affirmed a chancellor's award of periodic and lump sum alimony on remand from the first appeal of this matter. The case was remanded based on a miscalculation in marital asset division. On remand, the chancellor awarded the wife $812,594 in marital assets (70%), $3,000 a month in periodic alimony, and $700,000 in lump sum alimony. The court of appeals rejected the husband's argument that the award was excessive. He had separate assets of $7 million. His argument that his expenses exceeded his income was not supported by the record.

D. Health insurance

Griner v. Griner, 282 So. 3d 1243 (Miss. Ct. App. 2019) The court of appeals rejected a husband's argument that a chancellor should not have awarded his wife health insurance because that issue was not submitted to the court for decision in their agreement to irreconcilable differences divorce. Health insurance is a form of alimony, which was submitted as an issue. The chancellor did not err in awarding the wife health insurance until she reached the age of sixty-five.

E. Award of rehabilitative alimony

Prestwood v. Prestwood, 285 So. 3d 1213 (Miss. Ct. App. 2019). The court of appeals affirmed a chancellor's award of $1,500 a month in rehabilitative alimony for five years to a wife of fourteen years. She had worked as a teacher for eleven of those years and planned to return to teaching. The husband had net income of $8,000 a month and agreed to pay child support of $2,100 a month. The wife could earn $2,000 in net income a month teaching. In addition, she received marital assets including $40,000 in cash and $80,000 in retirement. She lived rent-free in a home owned by her parents. The court of appeals reiterated that rehabilitative alimony is intended to give the recipient a chance to become self-supporting and to prevent destitution while reentering the work force. The trial court found that her expenses were inflated, including a maid, which the chancellor considered a luxury. She testified that she had substantial debts but offered no evidence of the obligations. The court of appeals held that the award was sufficient, stating that the court "is not required to make both parties financially equal."

F. National trends in alimony

At least twelve states have enacted alimony guidelines that limit the length or amount of alimony or both. For example:

- Alabama - preference for rehabilitative alimony not to exceed five years. Under twenty years, courts may award alimony equal to marriage length. No limits apply to alimony awards in marriages over twenty years.
- New Hampshire – courts may award a maximum of 30% of the disparity between the spouses' incomes for up to one half of the marriage length.
- Maine - rebuttable presumption against alimony in marriages of less than ten years and a rebuttable presumption against alimony for longer than one half of a marriage between ten and twenty years.
- Texas - limits alimony to five years for marriages under twenty years, seven years for marriages between twenty and thirty years, and ten years for marriages over thirty years.
- Indiana - alimony may not exceed three years unless the recipient is disabled or caring for a disabled child. The amount of support may not exceed the lesser of $5,000 per month or 20% of the payor's income.
- Delaware - in marriages under twenty years alimony may not exceed one half of the length of the marriage.
- Utah - alimony limited to the number of years of the marriage unless the court finds extenuating circumstances.

G. Mississippi alimony chart

The Mississippi alimony chart (inserted in the materials) reviews alimony cases decided by Mississippi appellate courts in the twenty-five years since the court adopted equitable distribution. The study excludes cases with insufficient information to categorize the award and cases that were decided based on a legal issue rather than a factual analysis of the appropriateness of an award.

The study describes the type and amount of alimony awarded by length of marriage, dividing cases into those involving marriages ten years and under, marriages ten to nineteen years, and marriages twenty years and over. For cases with exact information on income, the study identifies the income disparity between the parties and describes the award as a percentage of the income disparity.

The chart reflects that in Mississippi, as in other states, the length of marriage is probably the most critical factor in awarding alimony. Permanent alimony was awarded and affirmed in two-thirds of the cases involving marriages over twenty years, approximately half of those between 10 and 19 years, but only about 20% of those under ten years. The length of marriage also appears to affect the extent to which a court will close the disparity gap between spouses incomes.

VI. CUSTODY

A. Presumption against custody to parent with history of family violence

Warner v. Thomas, 281 So. 3d 216 (Miss. Ct. App. 2019). A chancellor properly denied a mother's petition to modify joint custody, filed four months after the original decree. She argued there had been a material change in circumstances and that the father should be presumed unfit for custody. According to her, the joint custodial father cursed at her, attempted to strike her and instead struck the child, and would not let her leave with the boy. The father's testimony directly contradicted hers. No other adult witnessed the incident. The court of appeals agreed with the chancellor's finding that the single incident did not constitute a "history of family violence" that would create a presumption against custody to the father. A history of family violence is defined as a single incident that causes serious injury or a pattern of violence. Even under the mother's version of the facts, the incident did not meet that definition.

B. Custody between parents

1. Between fit parents – argument for joint custody presumption

Avants v. Hamilton, 281 So. 3d 1035 (Miss. Ct. App. 2019). The court of appeals affirmed a chancellor's award of custody to the mother of a seven-year-old girl. The parents lived together until the girl was six. The mother was the child's primary caregiver. The father worked two weeks on and two weeks off in the oil industry. When the mother moved out, the court awarded temporary joint physical custody to the parents with alternating weeks. The father quit his oilfield job to spend more time with his daughter, obtaining part time work and using his savings to build a house. The chancellor found that the mother was slightly favored on the child's age and health. She was favored on continuity of care prior to the separation, although the father did share in the girl's care. She was also favored on employment and capacity to provide childcare, because she had a steady job that allowed her to support her daughter while having the ability to provide childcare. In contrast, the father had quit a better paying job to be at home, was working part time, and had less family support for childcare. The court found that both had stable households, that the child was equally attached to both of her parents, and that they had equally strong parenting skills. The court of appeals held that the chancellor erred in finding that the girl's age favored the mother, noting that the court has frequently stated that a child of four is no longer of tender years. However, the court affirmed the award.

Five judges joined in a concurrence urging the adoption of a presumption of joint custody between fit parents. The concurrence cited a recent study that reviewed parenting time in cases in which both parties sought custody, both were fit parents, and there were no extenuating circumstances such as domestic violence. Mississippi ranks 48th in the amount of time provided to noncustodial parents at 23% of the time. The concurrence urged that the courts consider adopting a rebuttable presumption that fit parents should be awarded joint physical custody.

2. Assistance to provide childcare

Lee v. Bramlett, No. 2017-CA-01202-COA, 2019 WL 925488 (Miss. Ct. App. Feb. 26, 2019). The court of appeals affirmed a chancellor's award of custody to an offshore worker father of a six-year-old boy over the boy's stay-at-home mother. The couple lived together with the boy for the first four years of his life. After they separated, the court entered a temporary joint custody order. Two years later, when the mother moved from Hattiesburg to live with her fiancée in Madison, the father requested emergency custody. The court awarded custody to the father, even though he worked in the oil industry three weeks on and three weeks off. The paternal grandparents planned to care for the boy when their son was offshore. The court rejected the mother's argument that the order gave de facto joint custody to the father and grandparents and that the grandparents should have to overcome the natural parent presumption to gain custody. To adopt the mother's argument, no parent who traveled extensively could be awarded custody.

Under the *Albright* analysis, the father was favored on parenting skills in part because the mother had recently moved the boy away from his extended support network and school to be with her fiancée. Capacity to provide childcare favored neither – the mother was at home with a new child, but the father had an extensive network of family and his new wife who could help provide care. The boy's home, school, and community record favored his father. He had lived most of his life in Hattiesburg, was excelling in school there, and had extended family there. The father was favored on employment and stability of the home environment. He lived in the same home for over a decade and worked for the same company for five years while the mother had recently moved twice and was not employed. Three judges dissented, arguing that the natural parent presumption should have favored full-time custody in a stay-at-home mother over a father who would split custody with his parents.

3. Parental interference

Kaiser v. Kaiser, 281 So. 3d 1136 (Miss. Ct. App. 2019). The court of appeals affirmed an award of custody of ten-year-old and fourteen-month-old girls to their mother. The children remained in Mississippi with their father after the couple separated and the mother moved to Louisiana. Several months later the mother called the police when her boyfriend attempted to assault her during the girls' visitation period. For the next three months, the father thwarted the mother's attempts to see her daughters, including removing the older girl from school one day to prevent the mother from visiting her. He obtained an order of protection against the mother alleging that she was stalking her daughter. The mother's relationship with the boyfriend ended several months after the court entered an order prohibiting her from having the boyfriend in their presence.

The chancellor did not err in awarding the mother custody in spite of the incident with her former boyfriend. The chancellor found against the mother on moral fitness, based on her poor judgment regarding the relationship. However, all other factors favored the mother or were neutral. The father had interfered with the mother's visitation, keeping her from a fourteen-month-old child for three months, hiding them, and suggesting at one point that she could pay to see them.

4. Risk of abduction

Sanders v. Sanders, 281 So. 3d 1043 (Miss. Ct. App. 2019). The court of appeals affirmed a chancellor's award of custody to a Japanese mother of a three-year-old girl, in spite of the father's concerns that she would abscond with the girl. The mother was favored on continuity of care and parenting skills. The father was favored on home, school, and community record, in part because he lived with his parents, while the mother lived in an apartment. The court rejected his argument that the court should have considered that the mother might abscond with the girl to Japan. She testified that if she was unable to find work in the states, she might have to return to Japan. But she also stated that if she did, the father should have two lengthy visitation periods with his daughter each year. There was no evidence that she planned to abduct the girl. The chancellor properly addressed the father's concerns by allowing him to retain his daughter's passport. The court did not err in denying his request for injunctive relief to prevent the mother from leaving the state with the girl or his request to notify the FBI and the Japanese embassy of the risk of abduction. The chancellor's remedy was appropriate under the circumstances.

5. Parent's sexual preference

Garner v. Garner, 283 So. 3d 120 (Miss. 2019). In a custody modification action between a mother and a boy's step-uncle, the mother argued that the uncle's homosexuality should weigh against him on the factor of moral fitness. The majority rejected her argument, stating that she should have raised that concern when she originally gave custody to her brother (now deceased) and his partner, the step-uncle. The dissent disagreed with the majority's holding on this factor, stating that post-*Obergefell* a potential parent's homosexuality should not be considered any differently than a parent's heterosexuality.

6. Immigration status

Garner v. Garner, 283 So. 3d 120 (Miss. 2019). In a custody modification action, a chancellor found a step-uncle favored over a mother on stability of home environment, based on the mother's violent household and her questionable judgment in living with someone who was violating immigration laws. The dissent disagreed with the majority on this factor, stating that one's citizenship status, or the status of one's partner, should not affect their fitness to be a parent..

7. Home, school and community record

Shirley v. Whitehead, 283 So. 3d 736 (Miss. Ct. App. 2019). The court of appeals affirmed a chancellor's award of custody to the mother of a young girl. Although the mother had moved four times since the three-year-old's birth, she was currently living in an apartment, had a job, and had arranged daycare for her daughter. The father was living with his mother and working at a new job. The court of appeals rejected the father's argument that home, school, and community record should have favored him

because of his extended family. The chancellor found the factor favored the mother because the girl had started daycare in her hometown and her grandparents lived nearby. Nor did the chancellor err in finding the factor of stability of home environment to be neutral, even though the mother had moved and had an entry-level job. She had her own place, was working, and was attending school.

8. Parents' physical and mental health

Thomas v. Thomas, 281 So. 3d 1191 (Miss. Ct. App. 2019). The court of appeals affirmed a chancellor's award of custody of three girls aged twelve, fourteen and sixteen to their mother, even though two of the girls asked to live with their father. The father was recently disabled, had a history of drug and alcohol abuse and had exhibited disturbing and sometimes violent behavior, including two arrests for domestic violence. The mother had been the children's primary caregiver. The mother had an extramarital affair, giving birth to a boy that that her husband raised as his own. The man with whom she has the affair was made a party to the case and declared to be the boy's biological father; however, the husband was granted visitation with the boy. The chancellor found that the mother was favored on physical and mental health because of the father's history of alcohol and drug abuse and ongoing issues related to his disability. The chancellor did not err in finding moral fitness to be neutral. The mother had an affair and deceived her husband, but the father had exhibited disturbing behavior that disrupted the household and upset the children. The chancellor awarded the husband and wife joint legal custody, with physical custody to the mother and extensive visitation to the father.

Vandenbrook v. Vandenbrook, 292 So. 3d 991 (Miss. Ct. App. 2019). A chancellor did not err in awarding custody of three boys to their stay-at-home mother. The chancellor found that she was favored on the factors of continuity of care, parenting skills, employment responsibilities, emotional ties, and the choice of the two children over twelve. The father was slight favored on the sex of the children.

Martin v. Martin, 282 So. 3d 703 (Miss. Ct. App. 2019). A court properly awarded custody of a couple's son to his father, finding that the father was favored on the factors of the child's preference and moral fitness. The mother argued that the guardian ad litem's failure to discuss the father's cohabitation with his girlfriend required reversal; however, the issue was addressed extensively at trial and considered by the court.

C. Visitation

1. No visitation

Williams v. Williams, 264 So. 3d 722 (Miss. 2019). A chancellor did not err in refusing to order a seventeen-year-old boy attending boarding school in Florida to visit his noncustodial mother regularly. She engaged in conduct that alienated the boy, including removing his belongings and money from the marital home and refusing to sign documentation to allow him to drive or to obtain a passport to travel with the

USA baseball team. She refused to allow him to transfer to a school with better baseball opportunities. The presumption that a noncustodial parent should have visitation may be overcome upon proof that visitation is not in the child's best interest. The chancellor did not abuse her discretion in declining to award visitation in these unique circumstances.

2. Extensive visitation

Thomas v. Thomas, 281 So. 3d 1191 (Miss. Ct. App. 2019). A chancellor awarded custody of three girls to their mother, even though two girls requested to live with him. The chancellor awarded the father extensive visitation of three weekends a month in light of their request. The court rejected the mother's argument that the court erred in giving the father more than standard visitation, stating, "In general, visitation with the noncustodial parent should be liberal rather than restricted."

D. Modification of custody

1. Adverse impact

Butler v. Mozingo, 287 So. 3d 980 (Miss. Ct. App. 2019). The court of appeals reversed and rendered a chancellor's modification of custody of a three-year-old boy from his mother to his father based solely on the mother's multiple moves. The chancellor found a material change in circumstances based on the mother's five moves in two years. She and her son lived with her brother, then in an apartment, then in a house with her mother, then with a friend, and finally, for the year prior to the hearing, in a mobile home that she was purchasing. The mother also had a second child for whom the father provided no support. All parties testified that the boy was doing well and was happy and healthy. The chancellor found that the moves and instability in the household constituted a material change that had adversely affected the boy. The court of appeals affirmed the chancellor's finding that the moves and change in household composition was a material change, but held that the record was devoid of evidence that the child was adversely affected by the moves. A chancellor must find both a material change of circumstances AND an adverse effect on the child to undertake an *Albright* analysis. The chancellor made no finding to that effect, and the record did not support such a finding. The court reversed and rendered the award of custody to the father.

Jackson v. Jackson, No. 2017-CA-01077-COA, 2019 WL 1253311 (Miss. Ct. App. March 19, 2019). A custodial mother's report to DHS of suspected abuse by the child's father was not a material change in circumstances adversely impacting the child. The mother purchased an educational book about appropriate and inappropriate touch, which she read a number of times to her four-year-old son. A few weeks later, the boy made several comments to family members about his father touching him. The mother filed a petition to restrict visitation and reported suspected abuse to DHS. Within six days, DHS interviewed the boy, investigated, and dismissed the charges, finding no abuse. The father petitioned to modify custody based on the mother's filing of unsubstantiated charges. The court of appeals affirmed the chancellor's finding that

the incident was not a material change that adversely affected the boy or impacted his relationship with his father. The matter was handled quickly, dismissed, and did not appear to affect the boy. Because the chancellor did not find a material change or adverse effect, she was not required to undertake an *Albright* analysis to determine the child's best interest.

Barbaro v. Smith, 282 So. 3d 578 (Miss. Ct. App. 2019). A chancellor properly modified custody of an eighteen-month-old boy to the father after the boy's mother alleged that the father drugged the child and falsified a drug test to support her allegation. She was also involved in planting illegal drugs in the father's truck and tipping off the police to arrest him. All witnesses contradicted the mother's testimony that the boy was groggy and lethargic when she picked him up from visitation. Photographs taken immediately before she picked him up showed the boy looking well and happy. In addition, the mother called the father and told him the son had tested positive for drugs two days before she received the lab report. The chancellor found that her conduct was a material change in circumstances that adversely affected her son – first, by causing the court to order an emergency change in visitation, and second, because her conduct could have irreparably damaged the boy's relationship with his father if he had been convicted for possession of drugs. The fact that the boy suffered no injury did not prevent modification — a child living in adverse circumstances may be removed without a showing of injury if it is clearly in his best interest. The factor of continuity of care was the only factor in the mother's favor, while the father was rated more highly on parenting skills, sex of the child, stability of the home environment and mental health. The court rejected her argument that the fabricated drug test and planted drugs were "isolated" events.

2. Parental interference

Hayes v. Hayes, 281 So. 3d 1002 (Miss. Ct. App. 2019). A chancellor did not err in finding a mother's conduct was a material, adverse change in circumstances that warranted modifying custody to the father. In the first year after their divorce, she denied the father visitation on at least ten occasions, filed unsubstantiated reports of sexual abuse, filed an unfounded domestic abuse report, posted negative comments about him on social media, and attempted to alienate the child from him.

Munday v. McClendon, 287 So. 3d 303 (Miss. Ct. App. 2019). A chancellor properly modified custody of a nine-year-old girl from her mother to her father. The mother moved with the child to Louisiana, away from extended family, and enrolled her in a new school. The girl's school record showed excessive unexplained absences at the new school. The mother failed to cooperate with the father to designate make-up days, refused to allow him to text or talk with his daughter, and prevented him from exercising summer visitation. He also provided evidence that the child was severely sunburned in her care and came to his house covered in flea bites on one occasion. The guardian ad litem's report found a material change in circumstances based on the totality of circumstances – the move, the absences, the mother's interference with visitation — and recommended modification of custody. The court rejected the mother's

argument that the chancellor failed to make the necessary findings because the judgment did not state that a material change had occurred. The court made extensive findings of fact and adopted the GAL's report, which found a material change of circumstances. The mother was favored on continuity of care, while the father was favored on parenting skills, stability of home environment, and home, school, and community record of the child.

3. Parental conduct

Wilkinson v. Wilkinson, 281 So. 3d 153 (Miss. Ct. App. 2019). A mother's erratic and sometimes volatile post-breakup behavior was not a material change in circumstances warranting modification of custody of her daughter. The mother and father were entangled in a "toxic" love-hate relationship in which both engaged in volatile conduct, sometimes in front of their daughter. The mother admittedly acted poorly, including sending profane texts, losing her temper, using profanity in front of her daughter, and running her vehicle into her ex-husband's truck. However, the father provoked some of the incidents in order to record her. In addition, he lost his temper during a visitation exchange, resulting in a protection order against him. The court of appeals affirmed the chancellor's decision that the mother's conduct did not place her daughter in danger, particularly since the parents were restrained in their ability to contact each other going forward. The chancellor found that both were good parents individually, but brought out the worst in each other.

4. Motion to dismiss

Page v. Graves, 283 So. 3d 269 (Miss. Ct. App. 2019). The court of appeals reversed a chancellor's Rule 41 dismissal of a mother's petition to modify custody for failure to a material change in circumstances in the custodial father's home. At divorce, the parents agreed that the father would have custody. He planned to live in Monroe, Louisiana, where he had extended family, including his mother and sister who were special needs teachers. Both of their girls were autistic and required special care. Subsequently, the girls spent the summer in Virginia with their mother and, pursuant to an out-of-court agreement between the parents, stayed with her for two and a half years. The father subsequently withdrew his agreement and returned with the girls to Clinton, Mississippi, where he lived with his girlfriend. The chancellor found that any problems the girls were experiencing were related to their autism and existed at the time of the divorce litigation. The court of appeals reversed, holding that the mother met her burden of proof. The father had moved the girls away from their support system to a new place, with a new household member, then to an apartment and a different school system. There was evidence that he was not attentive to the younger girl's health needs and the girls' clothing and hygiene. The court reversed and remanded, holding that the mother presented sufficient evidence to survive the motion to dismiss. Three judges dissented, believing that the chancellor did not abuse his discretion.

NOTES

E. Custody between parent and nonparent

1. The natural parent presumption

Seale v. Thompson, 282 So. 3d 501 (Miss. Ct. App. 2019). A grandfather was properly awarded custody of four and five year old boys. The grandfather rebutted the natural parent presumption by proving that the father was unfit based on his prior drug abuse and imprisonment. At the time of trial, the father was sober, employed as an electrician, paid child support, and regularly visited the boys. They loved him and looked forward to his visits. However, the chancellor did not err in finding that his prior drug use, convictions, and imprisonment kept him from the boys in their early years and constituted unfitness. The grandfather stood in loco parentis to the boys, taking early retirement to care for them and acting as a father to them. The court noted that a grandparent who acts in loco parentis to a child is not entitled to custody against a natural parent without overcoming the natural parent presumption.

2. In loco parentis status

Ballard v. Ballard, 289 So. 3d 725 (Miss. 2019). The supreme court shifted its approach to the natural parent presumption and the in loco parentis doctrine, affirming a custody award to a man who acted as father to his wife's child. On remand from the first appeal of this matter, the chancellor awarded a husband custody of three girls. Two were his biological children. One was born during the marriage as the result of the mother's extramarital affair. The mother argued that a man who acts in loco parentis must overcome the natural parent presumption by proof of abandonment, desertion, immoral conduct or unfitness before being considered in a best-interests custody analysis. She relied on *Waites v. Ritchie*, 152 So. 3d 306 (Miss. 2014), which stated that any third party, including men acting as fathers, must overcome the natural parent presumption to gain custody. The father relied on the court of appeals' reasoning in *Welton v. Westmoreland*, 180 So. 3d 738 (Miss. 2015). In that case, the court of appeals held that a man who acts as a child's father is not required to overcome the natural parent presumption if the biological father is not in the picture. In this case, the biological father never supported the girl and did not attend the custody hearing although he received notice.

The supreme court agreed, adopting the court of appeals rule in *Welton*. The husband was not required to overcome the natural parent presumption because of the biological father's absence. The supreme court also affirmed the chancellor's finding, under *Albright*, that custody in the father was in the children's best interest. He was favored on the factor of parenting skills. He paid child support while the children were in their grandparents' custody, while his wife did not. He treated the nonbiological child as his own and moved his location to be close to all three girls. He was also favored on employment because of his steady job and flexible schedule. His wife chose to work part time and lived in poverty with four other children. And, although both had struggled, the father had made progress while the mother denied responsibility for her actions. The court rejected the mother's argument that it was error to separate the girls from their four half-siblings, particularly considering the mother's financial circumstances.

In re Guardianship of T.N.W., 287 So. 3d 1030 (Miss. Ct. App. 2019). The court of appeals reversed and remanded a chancellor's award of guardianship of a fourteen-month-old girl to her grandparents, disagreeing with the chancellor's finding that the mother had deserted her child. The mother lived with and cared for the child for the first four months of her life. Over the next eight months, the grandparents had temporary guardianship. During that time, she lived in their house and provided care for the girl for two periods of several weeks and later for a month and visited her daughter at least twenty times. The mother had secured a job and home and arranged for daycare for the girl. She testified that her parents "kicked her out" when she hired an attorney to contest their petition for guardianship. The grandparents failed to rebut the natural parent presumption – the mother had not deserted the child, but had in fact attempted to be present in her life and to become financially able to support and care for her.

3. Modification

Garner v. Garner, 283 So. 3d 120 (Miss. 2019). A child's step-uncle rebutted the natural parent presumption and was entitled to custody over the boy's mother. In November of 2010, the biological mother voluntarily transferred custody of her fifteen-month-old son to her brother Jason and his partner, the step-uncle. Jason subsequently died. In December of 2013, the mother and step-uncle entered an agreed order that she would have custody and he would have extensive visitation. The agreement also provided that the boy would continue treatment with his psychologist unless released or referred to another doctor. In September of 2016, the step-uncle and the boy's grandparents filed petitions to modify custody based on the mother's unfitness. Several months prior to trial, the mother filed two reports of child sexual abuse against the uncle, both of which were found by CPS to be unsubstantiated. While the action was pending, she tested positive for cocaine.

The supreme court agreed with the chancellor that the uncle rebutted the natural parent presumption by proving unfitness. The court also found that the mother's conduct constituted a material change in circumstances adverse to the child. She had a history of drug and alcohol abuse, including while the trial was pending. She was involved in a violent relationship with her husband. He disciplined the boy in a manner the psychologist deemed abusive. She refused to seek treatment for her depression and bipolar disorder. She was not employed, making it difficult for her to support her son. She discontinued the boy's counseling sessions in violation of the December 2013 order. There was evidence that the boy was adversely affected by his mother's drinking and her violent relationship.

The court also agreed that the chancellor's *Albright* analysis supported an award of custody to the uncle. He was favored on the child's sex and health because of the boy's anxiety about being separated from him. He was favored on continuity of care, even though the mother had custody for the last three years, based on the extensive time the boy spent with him. He scored higher on parenting skills based on his attention to the boy's medical and psychological needs. The court rejected the mother's argument that as a homemaker she should be rated higher on ability to provide childcare – his employment was flexible. The court also rejected the mother's argument that the chancellor should not have commented negatively on her mental health based

on a diagnosis of depression. Her untreated mental health issues affected her ability to care for the boy.

4. Grandparent visitation

Garner v. Garner, 283 So. 3d 120 (Miss. 2019). The supreme court reversed a chancellor's order granting a step-grandfather visitation along with his wife, the child's grandmother. The Mississippi grandparent visitation statute does not define "grandparent." However, section (1) of the statute refers to visitation given to a "parent of a child's parent," which does not include a step-grandparent. The court declined to extend visitation beyond the statute, noting that great-grandparents are not entitled to visitation under the statute. Three judges concurred or dissenting, believing that the step-grandfather, who had acted as a grandparent since the child's birth, should be awarded visitation. The dissent pointed out that under the doctrine of in loco parentis, a step-parent may be treated as a parent for purposes of custody, suggesting that a non-grandparent might be treated as a grandparent based on that doctrine.

Vermillion v. Perkett, 281 So. 3d 925 (Miss. Ct. App. 2019). A chancellor properly granted a directed verdict to parents in a grandparent visitation action. The father's mother testified that she visited the child twice after her birth. Subsequently, the parents denied her visitation. The court rejected the grandmother's argument that the court should have considered their unreasonable refusal to allow her to see the child and determined whether visitation was in the child's best interest. The statute requires that a grandparent first show a viable relationship with the child – defined as some financial support over a six-month period and frequent visitation, including some overnights, for a year. An unreasonable refusal of visitation alone is not sufficient to award visitation. The court affirmed the dismissal with prejudice, but limited the dismissal to the facts alleged in the petition, leaving open that some future set of facts might warrant an award of visitation.

Vermillion v. Perkett, 281 So. 3d 925 (Miss. Ct. App. 2019). The court of appeals affirmed a chancellor's award of $7,384 in attorneys' fees to parents who successfully defended against the paternal grandmother's petition for visitation. The statute permits an award of fees to parents in grandparent visitation actions unless the chancellor makes a finding that the fees will not work a hardship on the parents. Although both parents were employed, they testified that the cost of the action and lost time at work had been a financial strain on them.

G. Guardians ad litem

Garner v. Garner, 283 So. 3d 120 (Miss. 2019). The supreme court rejected a mother's argument that a guardian ad litem's report was inadequate because the guardian did not interview her son regarding her allegations of sexual abuse. The guardian, who was not qualified to interview children regarding sexual abuse, properly left the investigation to experts.

Kaiser v. Kaiser, 281 So. 3d 1136 (Miss. Ct. App. 2019) The court rejected a father's argument that a chancellor erred in dismissing a guardian before she provided a final report. Chancellors have discretion to determine whether the facts allege abuse or neglect that requires appointment of a mandatory guardian. The guardian in this case was not mandatory. The father expressed concerns about the mother's boyfriend and the mother requested a guardian be appointed to look into the issue.

VII. CHILD SUPPORT

A. Payment in lump sum

McCall v. McCall, No. 2017-CA-01203-COA, 2019 WL 350628 (Miss. Ct. App. Jan. 29, 2019). The court of appeals rejected a father's argument that his agreement to pay $100,000 in lump sum child support was unenforceable. At divorce, he agreed to pay $3,500 a month in child support for two children plus a lump sum payment of $100,000 shortly after the divorce was final. Two years later, he was $198,205 in arrears. While a chancellor may not order lump sum support, parties have the freedom to contract for a lump sum payment. The dissent argued that an agreement for lump sum was against public policy because child support should always be modifiable based on a change in the child's needs or the payor's financial circumstances.

B. Findings of fact

Vandenbrook v. Vandenbrook, 292 So. 3d 991 (Miss. Ct. App. 2019). The court of appeals reversed an award of 22% of a father's adjusted gross income of $16,785, holding that the chancellor erred in failing to make a written finding as to whether application of the guidelines was reasonable.

C. Determining income

1. Bonuses and stock options

Vandenbrook v. Vandenbrook, 292 So. 3d 991 (Miss. Ct. App. 2019). The court rejected a father's argument that child support should have been calculated using his base income excluding bonuses and stock options. The chancellor properly averaged his fluctuating income over a four-year period, including the bonuses and stock options, which he received every year. Income for purposes of child support includes "all potential sources that may reasonably be expected to be available" to the payor. (Quoting MISS. CODE. ANN. § 43-19-101(3)(a)).

2. Imputed income

Williams v. Williams, 264 So. 3d 722 (Miss. 2019). A chancellor properly imputed income to a noncustodial mother who claimed to have net monthly income of $1,010. Her gross earnings in 2013 were $242,763. She purchased a new home in 2015 and, according to her daughter, purchased a boat and airplane. A court may impute income

to a payor whose reported income is not adequate to support their lifestyle. Ordering her to pay $1,000 a month in child support was appropriate, even though her son was attending boarding school on scholarship. He still had expenses that should be covered by child support. And, she had not paid support in the three years since the couple separated.

Thomas v. Thomas, 281 So. 3d 1191 (Miss. Ct. App. 2019). The court of appeals rejected a father's claim that a chancellor overstated his income and the mother's claim that she understated it. The father's testimony and three 8.05 financial statements were inconsistent. He had not filed personal or business income tax returns for several years. The chancellor found, using the evidence presented, that the father had adjusted monthly income of $9,700 from real estate appraisals, disability income, and rental income, reducing the amount by $1,200 to account for business expenses. The court of appeals also rejected the mother's argument that his income should have included an additional $1,100 for two mobile homes that he had recently purchased and would be able to rent. The chancellor was not required to make assumptions about future income.

D. Deviation from the guidelines

Gunter v. Gunter, 281 So. 3d 283 (Miss. Ct. App. 2019). A chancellor erred in awarding a custodial mother child support of 22% of the father's adjusted gross income plus one half of private school tuition without making a finding as to why the deviation was appropriate. Private school tuition is part of child support — an award in addition to statutory support is a deviation that must be justified by findings of fact. In contrast, the chancellor properly supported an award of one half of daycare costs, stating that it was only fair that the father pay a portion of daycare costs necessary for the mother to work. The court also held that the chancellor's award of medical costs above the statutory guidelines was not a deviation.

Thomas v. Thomas, 281 So. 3d 1191 (Miss. Ct. App. 2019). Strict application of the child support guidelines to a payor with income of over $100,000 a year was not appropriate. He was awarded three weekends of visitation a month instead of two. He was also awarded visitation with his wife's child by another man. Deviation is appropriate when a noncustodial parent spends more time than usual with children. He was ordered to pay $1,402 per month rather than the $1,870 that the guidelines would produce.

E. Social Security benefits

Thomas v. Thomas, 281 So. 3d 1191 (Miss. Ct. App. 2019). The court of appeals provided guidance for determining support when children receive benefits based on a parent's disability. The disabled father received Social Security disability benefits each month, including $700 a month in benefits for his children. The chancellor ordered him to pay the benefits to the mother and gave him a credit against his $1,400 a month child support obligation for that amount. The court of appeals rejected the mother's request that the court overrule prior cases holding that derivative disability

benefits for children are a dollar-for-dollar offset against child support.

F. Support retroactive to date of separation

Vandenbrook v. Vandenbrook, 292 So. 3d 991 (Miss. Ct. App. 2019). The court of appeals reversed a chancellor's child support award of 22% of a father's adjusted gross income over $100,000, in the amount of $3,690 a month. The award was made retroactive for seventeen months, dating back to the parties' separation (but excluding two months in which they lived in the same home). The chancellor credited the father with payments made under a temporary order requiring child support of $1,400 a month. The father argued that the court should also have credited him with other amounts paid to the mother during separation. Because the court reversed the child support award for findings to support application of the guidelines, the court reversed the retroactive award for the same findings.

G. Award of tax exemptions

Vandenbrook v. Vandenbrook, 292 So. 3d 991 (Miss. Ct. App. 2019). The court of appeals declined to reverse a chancellor's award of tax exemptions to a custodial mother, even though the exemptions would have been more valuable to the higher-income noncustodial father. The mother had begun working and did have income against which the deductions had value. The chancellor did not abuse her discretion in awarding the exemptions to the mother.

Thomas v. Thomas, 281 So. 3d 1191 (Miss. Ct. App. 2019). The court of appeals affirmed a chancellor's order alternating the income tax exemptions for two children between the parents. There is no requirement that a chancellor make specific findings of fact to support an award of the exemptions. The court noted that the record contained support for the award, since the father's higher income made the exemption more valuable to him.

H. Modification

1. Modification of lump sum support

McCall v. McCall, No. 2017-CA-01203-COA, 2019 WL 350628 (Miss. Ct. App. Jan. 29, 2019). A chancellor properly refused to reduce a payor's child support obligation even though he suffered a loss in income two years after his divorce. The couple's 2014 divorce agreement provided that the father would pay $3,500 a month in child support plus $100,000 in a lump sum in May of 2014. Two years later, he was almost $200,000 in arrears, having made only a few payments under threat of incarceration. The father argued that his loss of ownership of a Texas sawmill in 2016 was a material change in circumstances supporting downward modification. The court of appeals held that the chancellor could not have modified the lump sum payment, which was vested when it was due. With regard to the monthly payment, the court noted that ordinarily, loss of substantial income would be a material change. But here, because the father was delinquent long before the income loss, the request was prop-

erly denied. The dissent argued that the income loss was a material change supporting modification.

2. Parent's choice to discontinue tuition payments

Collado v. Collado, 282 So. 3d 1239 (Miss. Ct. App. 2019). The court of appeals reversed a chancellor's order requiring that a father continue to pay private school tuition for his four children. At divorce, the parents agreed that the father would pay private school tuition for the children "so long as the parties jointly agree for the children to be enrolled in private school." One year later, the mother sought to modify the agreed provision, alleging that the father had unilaterally decided he could no longer afford to pay tuition for all four. He proposed that the two younger children attend public school. The chancellor found that the father could afford tuition for all four children and ordered that he continue to pay.

The court of appeals reversed. An agreement to pay private school tuition, as part of child support, can be modified based on an unforeseeable material change. The only change was that the father no longer agreed that all the children should attend private school, a possibility that was addressed in the agreement and therefore foreseeable. The court held that the chancellor should have enforced the agreement as written.

3. Foreseeability

Martin v. Borries, 282 So. 3d 472 (Miss. Ct. App. 2019). A father was not entitled to a reduction in child support even though his income had decreased significantly since the prior order was entered. At divorce, he was ordered to pay $1,000 a month in child support plus one half of extracurricular activities, medical and dental insurance, and half of medical costs. Four years later, the parents agreed to increase support to $1,700 a month plus $300 for extracurricular activities. At that time, the father knew that his current overseas employment in the oil industry had a finite ending date. Two years later, he moved with his current wife and child back to Mississippi. He petitioned for a downward modification of support, alleging that he was unable to find comparable employment in Mississippi and was working as an electrician at a significantly lower salary. The chancellor denied his petition, finding that the reduction in income was voluntary and foreseeable.

The court of appeals affirmed, noting that there were overseas jobs available with comparable salaries that he rejected because he deemed the locations unsafe. The court also found that he had long planned to move back to Mississippi when his current wife became a citizen, so that his move was an anticipated change in circumstances. His former wife testified that he had told her repeatedly over the years that he would move back and she would be off "the gravy train."

4. Proof of increased expenses

Blevins v. Wiggins, 284 So. 3d 808 (Miss. Ct. App. 2019). Five years after divorce, a custodial mother sought to increase the father's child support. The couple entered an agreed order increasing support. Five years after the modification, she sought a

second modification based on increased needs of the children and the father's increase in income. The court of appeals reaffirmed that a noncustodial parent's increase in income is not, in itself, enough to warrant upward modification. The parent seeking modification must specifically prove the items and amounts of increased expense. The chancellor found that the children spent about 40% of their time with the father, resulting in his paying some expenses that would have been paid by the custodial mother. The court of appeals agreed that the mother failed to prove a material or substantial change that justified modification.

I. Suspension of support

Wilkinson v. Wilkinson, 281 So. 3d 153 (Miss. Ct. App. 2019). A father's child support obligation was met through in-kind support for six months in which he and the child's mother resumed their relationship. Although he did not move in with them, he spent several nights a week in their home and paid household expenses (such as rent and food) in an amount that exceeded his child support obligation. The chancellor found that their "quasi-marital" relationship suspended his obligation because their daughter was being supported financially as if her parents were married. The court of appeals affirmed, stating that because the chancellor found that the parties were in a de facto marriage relationship and the child was being supported, no child support was due during this time. However, the fact that he paid more in expenses than he owed in child support for the six months did not provide him with a credit against subsequent arrearages. Nor was he entitled to a credit against arrearages for voluntary payments toward the child's private school tuition. A parent who volunteers to pay tuition is not entitled to reduce his basic support payment by that amount.

Two judges dissented, arguing that the case on which the majority relied involved still-married parents who reconciled and lived together after a child support order had been entered. They urged that because child support is vested when due, it cannot be forgiven based on payment of household expenses as opposed to direct support.

J. Support for adult disabled child

Burrell v. Burrell, 289 So. 3d 749 (Miss. Ct. App. 2020). A chancellor properly refused to award a divorcing mother of an adult disabled son child support. The son, who lived with his mother, was not a party to the suit, was not under a guardianship or conservatorship, was not adjudicated a vulnerable adult, and was receiving Social Security benefits based on his disability. The court of appeals affirmed, stating the general rule that a parent has no obligation to support a child past majority. The court distinguished *Ravenstein v. Ravenstein,* 167 So. 3d 210 (Miss. 2014) in which a father was required to continue paying support for a son based on a judgment of divorce that he did not appeal. In that case, the son was found to be unable to care for himself and a conservator appointed. Here, the son was not a party to the proceedings and not under a guardianship or conservatorship.

NOTES

VIII. ENFORCEMENT

A. Credit against arrearages

1. For direct payments

Wilkinson v. Wilkinson, 281 So. 3d 153 (Miss. Ct. App. 2019). A chancellor properly suspended support during a couple's resumed relationship – the noncustodial father paid rent and household expenses in an amount exceeding his child support obligation. However, he was not entitled to a credit against subsequent arrearages for the amount by which his payments exceeded the support obligation during that time. Nor was he entitled to a credit against arrearages for voluntary payments toward the child's private school tuition. A parent who chooses to pay private school tuition voluntarily is not entitled to reduce regular support by that amount. However, he was entitled to a small credit for direct payments for the child's clothing and dental care.

2. For children's Social Security benefits

Thomas v. Thomas, 281 So. 3d 1191 (Miss. Ct. App. 2019). A father was entitled to credit against his child support arrearages of $30,920 for some, but not all, of a $21,038 lump sum disability benefit he received for his children. The lump sum represented benefits for the period from January of 2012 (the date of his disability) to March of 2015 (the date he was determined disabled). His child support arrearages accrued between November 2014, when he was first ordered to pay child support, and March 2015. Under Miss. Code Ann. § 93-11-71(6), a payor "who receives social security disability insurance payments" *and* "who is liable for a child support arrearage" is entitled to a credit against arrearages that accrue after the date of disability onset. Under the statute, the arrearages must have accrued before he received the lump sum. The father did not owe child support for the months of January 2012 through October 2014. However, he was entitled to a credit against arrearages for the remaining five months, when he was in fact ordered to pay support and in arrears. The court of appeals reversed and remanded for the chancellor to determine the proper amount of credit.

3. While noncustodial parent has custody

Schimpf v. Hardy, No. 2017-CA-01499-COA, 2019 WL 2265258 (Miss. Ct. App. May 28, 2019). A chancellor erred in awarding a custodial mother child support for nine months in which the father had temporary custody of their children. Nine years after divorce, the noncustodial father filed a petition to modify custody. The chancellor granted him temporary physical custody and ordered that he deposit monthly child support payments of $3,000 into his attorney's trust account. The final judgment modified custody to the father, terminated his support obligation, and ordered the mother to pay child support as of the date of final judgment. The court ordered that the $27,000 in child support for the nine months be paid to the mother. The court of appeals reversed. Child support belongs to the child, not to the custodial parent. The court noted that in cases in which noncustodial parents have taken de facto custody,

equity may require crediting the noncustodial parent with support for that period. In this case, the father's custody was pursuant to a court order. The chancellor erred in awarding the funds to the custodial mother for the period in which the father had temporary custody.

B. Civil contempt

Herrin v. Perkins, 282 So. 3d 727 (Miss. Ct. App. 2019). The court of appeals rejected a father's argument that pleadings for contempt were defective because they did not specifically delineate the dates and amounts of every missed payment. Under notice pleading rules, a pleading must inform the defendant of the claims and the grounds on which relief is sought. The mother's petition alleged that the father was in arrears on child support, daycare payments, and attorneys' fees award payments, providing amounts and inclusive dates. The fact that the amounts changed while the action was pending did not require that she amend the petition.

C. Criminal contempt

Latham v. Latham, 261 So. 3d 1110 (Miss. 2019). The supreme court affirmed a chancellor's finding that a defendant who failed to comply with his divorce judgment was in criminal contempt. A year after the parties divorced, the wife filed her third contempt petition against her former husband. The husband requested a continuance to go on a planned cruise, which the court denied. His attorney appeared and presented one witness on his behalf. The chancellor found the husband in civil and criminal contempt and ordered that he be incarcerated for seventy-two hours regardless of whether he purged the contempt. On appeal, the defendant argued that when criminal contempt is sought, chancellors must recuse themselves.

First, the supreme court held that the husband's failure to request recusal or raise the issue at trial below waived the issue on appeal. The dissent countered that the husband did not have notice from the pleadings that he was facing criminal contempt. The majority held that he waived any argument of lack of notice by failing to raise the issue in the court below. Furthermore, the majority believed that it was clear from the pleadings that the wife sought "punishment" for his noncompliance.

Six justices joined a concurrence seeking to clarify the law regarding criminal contempt and recusal. The concurrence explained that when a judge has substantial personal involvement in a criminal contempt prosecution – such as initiating the charge – the judge must recuse. However, there is no per se rule that a judge must be recused when a criminal contempt matter arises in an action. In this case, the judge did not have substantial personal involvement in the charge, which was initiated by the former wife.

Hayes v. Hayes, 281 So. 3d 1002 (Miss. Ct. App. 2019). A chancellor did not err in holding a mother in constructive criminal contempt for her repeated denial of visitation to the father, ordering her incarcerated for three hundred days, but suspending the order based on future compliance. While civil contempt seeks to secure compliance with a court order, criminal contempt is punishment for past conduct. To find a party in indirect criminal contempt requires notice, specification of the charges, a

hearing, and a finding of guilt beyond a reasonable doubt. The court rejected the mother's argument that she did not receive notice of the nature of the charge or its basis. Her ex-husband filed several petitions seeking criminal contempt. She agreed to a hearing to litigate the charges without objecting at trial. The court noted that she could have requested that the judge recuse himself from hearing the criminal contempt charges, but waived that issue by failing to request recusal until after the court rendered its decision.

D. Defenses to contempt

1. Inability to pay

Wilkinson v. Wilkinson, 281 So. 3d 153 (Miss. Ct. App. 2019). A chancellor properly found that a father was able to pay child support of $505 a month even though he was laid off for three months. He received a tax refund of $8,733 during that time.

2. Ambiguity

Jones v. Jones, 265 So. 3d 195 (Miss. Ct. App. 2019). A chancellor erred in finding a father in contempt for noncompliance with an ambiguous order for child support. The couple's divorce property settlement agreement stated that the father would pay $682 a month in child support and the parents would equally divide "school-related expenses, extracurricular activities, and any miscellaneous expenses which may arise." The agreement also provided that he would pay one-half of medical costs not covered by insurance within ten days of receiving invoices. Eight years after their divorce, the mother presented the father with bills for medical, school, and extracurricular expenses totaling $13,219. The chancellor found him in contempt for nonpayment.

The court of appeals held that the provision regarding payment of "any miscellaneous expenses" was ambiguous. It was arguably limitless, requiring the father to pay for half of any expense no matter the cost or his ability to pay. In addition, the provision requiring reimbursement of expenses ten days after submission of an invoice allowed the wife to wait eight years, submit thousands of dollars in expenses, and demand payment within ten days – something he was financially unable to do. The court noted that a property settlement agreement, like all contracts, carries with it a duty of good faith and fair dealing. Parties "are obligated to act in good faith and to treat each other with common courtesy and decency." The mother's substantial delay and the lack of specificity in the agreement made it impossible for the father to meet his obligation. The case was reversed for the chancellor to consider whether the mother's documentation of expenses was sufficient and whether the bills were timely submitted. The court also reversed the award of attorneys' fees, which was based on the contempt finding.

Vandenbrook v. Vandenbrook, 292 So. 3d 991 (Miss. Ct. App. 2019). A husband should not have been held in contempt for violating a temporary order by selling stock. The order restrained both parties from "transferring, assigning, borrowing against, concealing or in any way dissipating or disposing of any marital property." Without asking the court's permission, the husband sold stock that was rapidly losing value to

prevent additional loss. He did not dispose of the funds. The chancellor stated that if he had asked permission, she would have approved the sale, but held him in contempt for violating the order. The court of appeals reversed, holding that a reasonable person reading the order – which was focused on preventing dissipation – could have concluded that selling the stock to preserve value was permissible. Because the finding of contempt was reversed, the court also reversed the chancellor's award of attorneys' fees for the contempt matter.

Price v. Lisenby-Grundy, 281 So. 3d 952 (Miss. Ct. App. 2019). An order providing for grandmothers to cooperate to arrange visitation by the paternal grandmother was not sufficiently specific to find the custodial maternal grandmother in contempt. The order did not specify dates for visitation or the details of transfer. The visitation order stated that the paternal grandmother would have a visit at Christmas and a week in the summer, with the dates to be arranged between the grandmothers. The order required that the parties work cooperatively to arrange the times. The paternal grandmother alleged that when she arrived at the maternal grandmother's home to pick the boy up for summer visitation, the maternal grandmother ordered her off the property, stating that they were supposed to meet in Hattiesburg. The visitation did not take place. The chancellor held the custodial grandmother in contempt and ordered her incarcerated until the visitation took place. The court of appeals held that the order regarding summer visitation was too vague to allow a finding of contempt. It did not specify dates or logistics for visitation or how to handle the boys' possible reluctance to visit. Four judges dissented, arguing that the order was clear – the maternal grandmother was to provide the plaintiff with one week of summer visitation in Indiana, which she did not.

E. Failure to comply with property division orders

Hunt v. Hunt, 289 So. 3d 313 (Miss. Ct. App. 2019). A husband was in civil contempt of a property division agreement provision regarding his wife's personal property. The provision required that he return listed items of personal property and furnishings "in his possession or which he knows the whereabout of" in sixty days. The chancellor denied the wife's first petition for contempt based on the husband's sworn testimony that he did not know where the items were, but ordered that he search diligently for the items. In the wife's second petition for contempt, she testified – and her former husband admitted – that at least three of the items were in his storage shed. In addition, the husband's daughter by a former marriage testified that she had seen her father transfer a number of the items to her grandmother's house. The chancellor properly found the husband in contempt of both the divorce judgment and the first contempt order.

Jones v. Jones, 265 So. 3d 195 (Miss. Ct. App. 2019). A mother did not violate an agreement regarding personal effects. The divorce agreement stated simply that the husband would "retain possession of his personal belongings." The items he alleged that she had wrongfully retained were articles that he left in the marital home. And, although she did not refinance the house within two years as required by their agreement, she testified that the reason was that she was unable to make the required down

payment. Furthermore, she did not miss any payments and there was no showing that the delay affected his credit or ability to purchase a home.

F. Failure to comply with custody and visitation orders

Wilkinson v. Wilkinson, 281 So. 3d 153 (Miss. Ct. App. 2019). A mother was not in contempt for failure to comply strictly with a visitation schedule during a period in which she and the child's father resumed their relationship. The father testified that during this period, he actually had more time with his child than was required in the divorce agreement. However, the father was in contempt for returning the child on Monday rather than Sunday on Labor Day and Columbus Day weekends. Their agreement provided for Sunday night visitation on named holidays, but it did not include those weekends. His argument that he had extended days on "school holidays" was not supported by the agreement.

Garner v. Garner, 283 So. 3d 120 (Miss. 2019). A mother was properly held in contempt for violating an order that she continue her son's psychological counseling with a particular psychologist unless he was released or referred to another provider. She unilaterally stopped the boy's treatment without court approval and asked a physician for a referral to another provider. The order providing that her son was to continue treatment unless he was released or "referred" meant referral by his current psychologist – not a referral from another physician at her request.

Jones v. Jones, 265 So. 3d 195 (Miss. Ct. App. 2019). A mother did not willfully violate provisions regarding visitation and notice of travel. The father could not specify dates on which he was denied visitation. She testified that the only times she refused visitation were when he did not have a home or was struggling with drug abuse. She acknowledged that she did not inform the father when she took the children out of town, but stated that she did not recall that provision of the agreement. She also testified that he did not inform her when he took them out of town.

Wilkinson v. Wilkinson, 281 So. 3d 153 (Miss. Ct. App. 2019). Both parents were held in contempt for violation of their divorce decree provision requiring that they refrain from speaking to each other in a derogatory manner. The court rejected the father's argument that there was no evidence that he violated the provision. On two occasions, he used vulgar language toward his ex-wife in the child's presence.

Brown v. Hewlett, 281 So. 3d 189 (Miss. Ct. App. 2019). A chancellor properly held a mother in contempt for denying a father's visitation and failing to appear at a hearing for which she had received notice. In 2015, the mother left her husband and moved to Missouri, taking their ten-year-old daughter with her. During the following year, the parents filed competing actions in Mississippi and Missouri. The Missouri court declined jurisdiction and the Mississippi court entered an order of temporary visitation, with which the mother failed to comply. She was ordered to comply and to dismiss all actions in Missouri. The mother again failed to comply. The father filed another petition for contempt and the mother again sought to invoke Missouri jurisdiction, without success. The process server for the Mississippi action concluded, after four at-

tempts to serve her, that she was evading service. The mother was ordered to appear at a show cause hearing in Mississippi on June 12. She did not. She was noticed to appear on August 8. Again, she did not appear. The court held the mother in contempt for denying visitation and for attempting to frustrate the proceeding by filing additional actions in Missouri after it declined jurisdiction. The court rejected her argument that she acted on the advice of Missouri counsel. She was not entitled to ignore the Mississippi order by filing additional actions in a state that had declined jurisdiction.

IX. PATERNITY

Diaz v. Department of Human Services, 283 So. 3d 265 (Miss. Ct. App. 2019). A father's petition to disestablish his paternity of a child was properly denied. The defendant began dating the child's mother shortly before she gave birth. He lived with her for four years, supporting the boy and her other two children. He was listed on school documents as the boy's biological father. The mother testified that she and the father signed a notarized, simple acknowledgement of paternity in 2014. Based on the document, the Department of Vital Records issued an amended birth certificate naming the defendant as the child's father and changing the boy's last name to his. The couple separated eighteen months later. The father alleged that his signature on the acknowledgment was a forgery. However, he presented no expert testimony. The court of appeals held that there was sufficient evidence to support the chancellor's finding that the signature was not forged and that the defendant was not entitled to disestablish his paternity. A legal father may not disestablish his paternity if he cohabited with the mother and voluntarily assumed a duty to support the child, knowing that it was not his. MISS. CODE ANN. § 93-9-10. The statute also provides that one who consents to be named as father on the birth certificate or executes a simple acknowledgement of paternity and does not withdraw consent with one year, may not disestablish his paternity absent fraud, duress, or material mistake of fact.

Pope v. Fountain, 287 So. 3d 988 (Miss. Ct. App. 2019). A boy's legal father (his mother's husband at the time of his birth) was a necessary party to the mother's paternity action against the boy's biological father. At the child's birth, the mother, her husband, and the biological father all knew that the child was not fathered by the husband. Nonetheless, he put his name on the boy's birth certificate and supported him. When he and the mother divorced, they listed the boy as a child of the marriage. He was awarded visitation and ordered to pay child support. The mother also allowed the biological father to have informal visitation with the boy. When the boy was nine, the biological father sought emergency temporary custody of the boy. The mother filed a paternity action against the biological father. The court consolidated the actions and awarded the biological father temporary custody. Although the legal father testified at the hearing that he did not want to disestablish his paternity, he was never made a party to the action. The chancellor found that the defendant was the boy's biological father, awarded him standard visitation, and ordered him to pay child support. The mother appealed, arguing that her ex-husband was a necessary party. The court of appeals agreed. He was the boy's legal father, had visitation rights, and had been ordered to pay child support. He testified that he did not want to end his relationship as the

boy's legal father. Without his presence in the action, the court risked conflicting orders of paternity, support, and visitation.

X. ADOPTION

Stacks v. Smith, 291 So. 3d 809 (Miss. 2020). In 2012, a married woman gave birth to a child fathered by the petitioner. When she died five years later, a couple sought to adopt the girl. The mother's former husband consented to the adoption claiming to be her biological father. Six months and seven days after the judgment of adoption was entered, the petitioner filed an action to set aside the judgment based on fraud on the court, alleging that he was the girl's biological father. He stated that he had helped to raise the girl until she was four, when he was imprisoned for parole violation and that the mother's husband and adopting parents knew the husband was not the child's father. The chancellor dismissed his petition, stating that only the legal father's consent to adoption was required. In addition, he found that the petition was barred by the six months statute of limitations provided in the adoption statutes.

The supreme court held that a chancery court has inherent power to set aside a judgment for fraud on the court – it does not require that the petitioner cite Rule 60 as the basis for the action. In addition, a chancellor may set aside an adoption for fraud on the court notwithstanding the six-month statute of limitations. The petition clearly alleged facts, if proven, that would constitute a fraud on the court. In addition, jurisdictional defects, including failure to join a parent of the child, are an exception to the six-month statute. A biological father who has not established his paternity "has a constitutional right to notice of an adoption proceeding if he 'has attempted to establish a substantial relationship with the child.' " If a chancellor finds that a father did not establish a substantial relationship with the child, the adoption need not be set aside. The court reversed and remanded for the chancellor to make findings regarding whether the father had established a substantial relationship with the child. If he did, he was a necessary party and the adoption must be set aside.

XI. TERMINATION OF PARENTAL RIGHTS

A. 2016 TPR Law

1. Findings regarding CPS actions

In re R.B., 291 So. 3d 1116 (Miss. Ct. App. 2019). A chancellor properly terminated parents' rights with regard to two children. The children were living in a car with their mother when they were taken into custody. She subsequently moved to Oklahoma and did not see them for three years. Their father, who was incarcerated, did not have extended interaction with them for three years. The youth court held a permanency hearing and determined that reunification was not in the children's best interest. CPS then filed termination proceedings in chancery court. The chancery court found, based on the youth court's finding, that reunification was not in the children's best interests, and that CPS had made reasonable efforts to assist the parents to

comply with the service plan. The court of appeals agreed with the chancellor that the determination of reasonable efforts is to be made by the youth court and may not be questioned by the chancery court hearing a TPR petition. The court also affirmed the chancellor's findings that the parents had failed to provide support for the children, failed to exercise reasonable communication with them, and that a deep-seated antipathy had developed based on the parent's conduct.

2. Notice of rights

In re B.E.G., No. 2018-CA-00553-COA, 2019 WL 3166018 (Miss. Ct. App. July 16, 2019). The court of appeals affirmed a chancellor's termination of a father's parental rights. The mother sought termination, alleging that the father had an ongoing drug abuse problem, had never met his infant son, had not seen his young daughter in fourteen months, and did not support the children. He was served by publication, based on the mother's affidavit that he had left the state and could not be located after diligent inquiry. He appeared on the initial hearing date, at which time the hearing was continued based on the GAL's request. The court informed him of the reset hearing date, stated that he would not receive additional notice, and suggested that if he wanted a lawyer he should engage one. He did not appear at the termination hearing. Six months after the judgment of termination, he filed a Rule 60(b) motion seeking to set aside the judgment.

The court of appeals rejected his argument that the judgment was void for lack of personal jurisdiction. The mother's statement satisfied the requirements for service by publication. The court also rejected his argument that the judgment was void because the judge failed to provide him with information required under the new termination of parental rights law – specifically, that he had the right to counsel, to remain silent, to subpoena witnesses, to confront and cross-examine witnesses, and to appeal. The statute requires that the judge provide this information at the beginning of the termination hearing. The earlier hearing at which he appeared was not the termination hearing because it was continued. He was not available at the termination hearing for the judge to provide the required information.

Three judges concurred specially, agreeing that the statute technically requires only that information be provided at the termination hearing, but suggesting that it would been better to provide the father with this information at the earlier hearing as well.

3. Unfitness

A.B. V. R.V., No. 2017-CA-00792-COA, 2019 WL 5168558 (Miss. Ct. App. Oct. 15, 2019). The court of appeals affirmed a chancellor's order terminating a mother's parental rights under the new TPR Law. The mother had a long history of drug use and, in spite of several attempts, an inability to remain sober. She had already lost custody of one child to her parents. She had been arrested four times. She admitted to drinking heavily while pregnant and breastfeeding. Her preschool-age children found her unresponsive on fifteen occasions and left the house. She was arrested in 2012 for driving intoxicated with the children in the car. At that point, her aunt was awarded temporary guardianship. Her last visit with the children was at a daycare center two

years prior to the hearing. She had not paid child support for two years and testified that she would not be able to support them for another year. Under the new TPR Law, a chancellor must first find the parent has abandoned or deserted the child or is unfit. If one of those is found, the chancellor must also find that reunification is not in the child's best interest. The court agreed that the evidence showed the mother unfit based on drug addiction, neglect, and criminal behavior. The court also properly found that reunification was not in the children's best interest, based on (1) her failure to address her drug and alcohol addiction; (2) her unwillingness to provide for the children's needs; and (3) deep-seated antipathy between the children and mother based in part on her conduct.

4. Abandonment

Harmon v. Ingle, No. 2018-CA-00116-COA, 2019 WL 2003943 (Miss. Ct. App. May 7, 2019). A chancellor properly terminated a father's parental rights to allow the mother's husband to adopt his children. The father was ordered at divorce to enter treatment for alcohol addiction, to be followed by supervised visitation for sixty days, then by unsupervised visitation. On the first unsupervised visitation, the older boy called to say that they were at a lake after dark with the father and his girlfriend and the father was intoxicated. As permitted by the divorce decree, the mother suspended visitation based on his alcohol use. She and her husband filed a petition for adoption. The court held that there was sufficient evidence to support termination based on abandonment. The father did not support the children, attempt to contact them, or establish supervised visitation in the three years after the initial unsupervised visit. The court rejected his argument that the mother did not notify him of her location and that he did not know how to reach them. She had the same cell phone number. He knew how to reach her mother, who could have told him her location.

B. Termination under prior law

J.P. V. L.S., 290 So. 3d 345 (Miss. Ct. App. 2019). A chancellor properly terminated a mother's rights based on abuse, for exposing her children to high levels of methamphetamine. The father's rights were terminated based on neglect — he failed to take steps to protect his children. The applicable statue was the prior law in effect when the petition was filed, not the new TPR Law that became effective while the action was pending. Under the prior law, a court hearing an adoption action must first find that the parents have deserted or abandoned the child or are unfit, which may be proved by grounds in either the adoption or termination of parental rights chapter. Second, the court must find that adoption is in the child's best interests.

The chancellor terminated the mother's rights based on abuse, finding that she exposed her children to meth residue, resulting in extremely high levels of the drug in their bodies. Witnesses testified that during this period, the children appeared dazed and disoriented. The five-year-old exhibited psychological problems and language disorder. The younger boy had developmental delays and language disorder. The chancellor found that the father's conduct – ignoring signs that his children were being exposed to drug use, failing to take steps to locate them when he heard they had been "taken" by someone, and failing to take his son to the emergency room after he was

burned – amounted to serious neglect. When a custodial parent neglects a child, a noncustodial parent who could remedy the situation but does not, has also neglected the child.

The court also based termination for both parents on the substantial erosion of the parent-child relationship criteria under the termination chapter. The court rejected the parents' argument that termination based on erosion of the parent-child relationship was improper because they had been subject to a no-contact order after their children were placed with the mother's cousin. Their conduct necessitated the placement.

The court also rejected the mother's argument that termination was improper because at the time of trial, she had been drug-free and employed for over a year. Her abuse was a repetition of her behavior eight years earlier, when she lost custody of her first child. The court believed it a risk to place the children with her where the cycle might be repeated.

XII. JURISDICTION AND PROCEDURE

A. Jurisdiction over custody

Abercrombie v. Abercrombie, 282 So. 3d 763 (Miss. Ct. App. 2019). The court of appeals rejected a Louisiana mother's argument that a Mississippi court's custody orders were void for lack of jurisdiction under the Uniform Child Custody and Jurisdiction Enforcement Act (UCCJEA). She alleged that at the time the father petitioned for divorce in Mississippi, the boy's home state was in Louisiana, placing jurisdiction there. The mother appealed the award of divorce pro se and alleged that Mississippi lacked jurisdiction over custody, but provided no evidence to support her argument. While the appeal was pending, she filed a petition seeking relief from judgment based on lack of jurisdiction and fraud. The chancellor denied her motion and she did not appeal. The father later filed a petition to modify visitation, which the court granted after finding that it had jurisdiction. The mother did not appeal that order. The chancellor entered a fourth order in March 2017 addressing various issues and, again, finding that it had jurisdiction. The mother did not appeal, but filed a motion to set aside for lack of jurisdiction. The chancellor denied the motion and she appealed the denial.

The court of appeals affirmed. The mother participated in three earlier cases in which the chancellor found that the court had jurisdiction over custody. She was barred by res judicata from litigating subject matter jurisdiction, which she waived by failing to appeal the prior orders.

While this appeal was pending, the mother revealed to her attorney that she and her former husband committed fraud in adopting the boy, by alleging that he was the boy's biological father. The chancellor set aside the divorce judgment for fraud. The majority disagreed with the dissenting judge, who argued that the court lacked jurisdiction because of the fraud. The issue of fraud, which arose after the appeal was filed, was not before the court on appeal.

B. Divisible jurisdiction

Crew v. Tillotson, 282 So. 3d 776 (Miss. Ct. App. 2019). In a case of first impression, the court of appeals held that a North Carolina divorce judgment was not res judicata with respect to property division, even though the Mississippi husband appeared in the action, giving the court personal jurisdiction over him. The majority held that Mississippi recognizes divisible divorce, allowing state courts to address financial matters not addressed on the merits in a foreign divorce action. The wife never submitted the issue of equitable distribution to the North Carolina court. She argued that North Carolina lacked jurisdiction to distribute property located outside the state. As support, she cited a North Carolina statute that states, "An absolute divorce by a court that lacked personal jurisdiction over the absent spouse or lacked jurisdiction to dispose of the property shall not destroy the right of a spouse to equitable distribution." The majority held that res judicata did not bar her action for equitable distribution in Mississippi.

Three judges dissented, arguing that the statute she cited did not apply because North Carolina *did* have personal jurisdiction over the husband and did have the power to address property matters. They cited another North Carolina statute that states, "[r]eal or personal property located outside of North Carolina is subject to equitable distribution ..., and the court may include in its order appropriate provisions to ensure compliance with the order of equitable distribution." They argued that she waived her claim to equitable distribution under North Carolina law by failing to request it in an action in which her husband personally appeared.

C. Service of process

Pritchard v. Pritchard, 282 So. 3d 809 (Miss. Ct. App. 2019). The court of appeals reversed and remanded a divorce judgment as void for defective service of process. The husband attempted to serve process on his Alabama wife by certified mail to her residence. It was not marked "Restricted". After three attempts to deliver it, the post office returned it as "unclaimed" – not as "refused." A second copy was sent by certified mail to the wife's mother's residence. Her sister signed for the letter as her agent (even though she was not authorized in writing to do so), and read the contents to the wife. The wife did not answer or appear at the hearing, at which the chancellor granted the husband a divorce and divided the couple's assets. The chancellor denied the wife's subsequent motion to set the judgment aside, finding that she was properly served by certified mail and had actual notice.

The court of appeals reversed, holding that the court lacked jurisdiction for these reasons: (1) Miss. R. Civ. P. 4 permits service on a nonresident by certified mail. However, the rule states that the envelope SHALL be marked restricted delivery. Neither envelope was marked restricted. (2) Rule 4 provides that service by certified mail is complete when a return receipt is received or the envelope is returned "refused." An "unclaimed" return does not satisfy the requirements. (3) Actual notice of an action does not cure defective service of process. (4) The sister's delivery of the second letter to the wife was not effective as personal service of process. The husband attempted delivery by certified mail, not by personal service. The sister never agreed to act as a process server. Three judges disagreed, arguing that Rule 4 permits personal service

of process by any person over eighteen – it does not require an agreement between the plaintiff and one who inadvertently delivers a certified letter.

Hilton v. Harvey, 284 So. 3d 850 (Miss. Ct. App. 2019). The court of appeals rejected a mother's argument that a chancery court lacked jurisdiction to hear a father's petition for modification of custody. She argued that because he served her more than 120 days after filing his petition, the action should be dismissed under Miss. R. Civ. P. 4. The court held that the 120 day requirement of Rule 4 does not apply in actions governed by Rule 81. The mother was properly served and the court had jurisdiction to determine the matter.

Edwards v. Edwards, 281 So. 3d 130 (Miss. Ct. App. 2019). The court of appeals reversed a chancellor's finding of contempt, holding that service of process was defective. The Rule 81 summons ordered the defendant to appear at the Oktibbeha County Courthouse in Starkville. However, the Oktibbeha County Courthouse is in Columbus, not Starkville. Columbus is home to the Lowndes County Courthouse. Rule 81 requires that the summons instruct the defendant to appear and defend on a certain date, in a certain place. Based on the information provided, the defendant would not know whether to go to Columbus or Starkville.

J.P. V. L.S., 290 So. 3d 345 (Miss. Ct. App. 2019). A father in a termination of parental rights action waived his challenge to service of process. Although he did not appear in the youth court's adjudicatory hearing, he subsequently secured counsel, who appeared on his behalf without challenging service of process.

D. Continuances

Johnson v. Johnson, 281 So. 3d 70 (Miss. Ct. App. 2019). A chancellor properly denied a husband's fourth request for a continuance for medical reasons. He did not appear and did not inform his attorney that he would not attend. Although the attorney stated that he had received information that his client was in the hospital, the husband provided no information to substantiate the claim.

Chism v. Chism, 285 So. 3d 656 (Miss. Ct. App. 2019). A chancellor properly denied a husband a continuance when his third attorney withdrew two days prior to his divorce trial. The action was pending for two and a half years. The husband was unable to retain counsel because he was uncooperative and refused to comply with discovery, resulting in incarceration twice while the action was pending. The court rejected his argument that he was denied process because he lacked counsel – there is no right to counsel in a civil proceeding. Nor was he prejudiced by the denial. The trial was fair, with the chancellor giving him flexibility to present his case as a pro se litigant.

Kaiser v. Kaiser, 281 So. 3d 1136 (Miss. Ct. App. 2019). A chancellor did not err in denying a husband's request to continue a trial when his attorney withdrew after presenting the husband's case-in-chief. The husband was granted a twenty-one day continuance until November 30, at which time his new attorney requested a second continuance. The court of appeals held that the chancellor did not err in denying the

additional continuance. The appellant suffered no prejudice from the denial. His attorney had already presented his case-in-chief. His new attorney was present for rebuttal. He was required to appear pro se only during his wife's case-in-chief, at which he cross-examined her extensively.

Munday v. McClendon, 287 So. 3d 303 (Miss. Ct. App. 2019). A chancellor did not err in denying a mother's request for a continuance to review a GAL report. The report was provided to her attorney three days prior to trial. The mother argued that she needed a continuance to submit documentation regarding her child's school absences. However, her attorney did not raise the issue at trial, thereby waiving the issue.

E. Recusal

Bradshaw v. Bradshaw, No. 2017-CA-01731-COA, 2019 WL 3815548 (Miss. Ct. App. Aug. 13, 2019). The court of appeals rejected a wife's argument that a chancellor should have recused himself. The chancellor granted a divorce immediately after she invoked the Fifth Amendment in response to questions about adultery. However, he subsequently set aside the divorce until testimony was presented on the remaining issues. The wife argued that his ruling on the divorce, combined with his statements regarding her hearing disability, reflected bias. The court of appeals held that the wife waived the issue of recusal because she did not make a request in the trial court.

Latham v. Latham, 261 So. 3d 1110 (Miss. 2019). A husband waived his argument that chancellors are required to recuse themselves when a charge of criminal contempt arises in a case. The supreme court held that his failure to request recusal or raise the issue at trial below waived the issue on appeal. Six justices joined a concurrence seeking to clarify the law regarding criminal contempt and recusal. The concurrence explained that when a judge has substantial personal involvement in a criminal contempt prosecution – such as initiating the charge – the judge must recuse. However, there is no per se rule that a judge must be recused when a criminal contempt matter arises in an action. In this case, the judge did not have substantial personal involvement in the charge, which was initiated by the former wife.

Hayes v. Hayes, 281 So. 3d 1002 (Miss. Ct. App. 2019). A chancellor did not err in holding a mother in constructive criminal contempt. The court noted that she could have requested that the judge recuse himself from hearing the criminal contempt charges, but waived that issue by failing to request recusal until after the court rendered its decision.

F. Evidence

Johnson v. Johnson, 282 So. 3d 738 (Miss. Ct. App. 2019). A chancellor properly admitted a wife's counseling records even though the husband did not receive the required statutory notice or a certified copy of the records. Although he objected to their admission as hearsay, he did not object to the inadequate notice and lack of certification and therefore waived the objection. The court also noted that admission was harmless because the information was cumulative.

Vandenbrook v. Vandenbrook, 292 So. 3d 991 (Miss. Ct. App. 2019). A chancellor committed harmless error by refusing to admit photographs of the marital home because the father did not provide documentary proof of the dates on which they were taken. They were offered to prove the state of the marital home while the mother lived in the house. He testified that he began taking photographs after she filed for divorce, which was sufficient to prove that the photographs were taken when he claimed. However, no prejudice occurred — admission of the photographs would not have changed the outcome of the custody dispute.

G. Res Judicata

McCall v. McCall, No. 2017-CA-01203-COA, 2019 WL 350628 (Miss. Ct. App. Jan. 29, 2019). Res judicata barred a father's argument that a court erred in approving his agreement to pay child support in excess of the guidelines. At divorce, he agreed to pay $3,500 a month in support plus a $100,000 lump sum payment shortly after divorce. Four months later, he filed a petition to modify the divorce judgment and a Rule 60(b) motion to set aside the agreement, which were denied. He did not appeal. Two years later, he filed a petition to modify child support, which was denied. On appeal of that denial, he argued that the chancellor erred in approving a divorce settlement agreement that included a lump sum child support payment, erred in approving a settlement that exceeded the child support guidelines, and erred in failing to provide findings of fact. The court of appeals held that his arguments should have been raised in an appeal of the divorce judgment and were barred by res judicata.

Price v. Lisenby-Grundy, 281 So. 3d 952 (Miss. Ct. App. 2019). A custodial grandmother argued that a trial court's grant of visitation to the paternal grandmother was void for lack of jurisdiction. The child's father and custodial grandfather were not included in the action. The court held that she waived her jurisdictional challenge by failing to raise the issue on direct appeal of that matter. When a case is litigated to final judgment and no appeal taken, a party who participated may not collaterally attack jurisdiction.

H. Statutes of limitation

Stubbs v. Stubbs, 281 So. 3d 125 (Miss. Ct. App. 2019). A wife's request for division of her ex-husband's retirement benefits, made twenty-one years after her divorce, was barred. She made no request for division of her husband's retirement benefits, property, or financial accounts in her 1996 divorce. In 2017, she filed a petition seeking fifty percent of his retirement account. An action founded on a judgment must be filed within seven years after the last renewal of the judgment. Furthermore, a Rule 60(b) motion must be filed within a reasonable time. The court agreed that retirement benefits accumulated during marriage are marital property, but stated that a party who fails to assert a right to marital property "may be estopped from asserting a later claim."

NOTES

I. Post-trial motions

1. Rule 59

Singleton v. Buford, 282 So. 3d 493 (Miss. Ct. App. 2019). The court of appeals reversed a chancellor's denial of a mother's motion to set aside an award of custody. She failed to appear at the custody hearing because her attorney's office staff calendared the hearing on the wrong date. The attorney discovered the mistake and appeared that day after the hearing had concluded. The attorney filed a motion for reconsideration before the judgment was entered and a motion for new trial the following day. The chancellor denied the motion, finding that the mother had not proved exceptional circumstances entitling her to relief under Rule 60(b).

The court of appeals analyzed the motion for reconsideration under Rule 59, noting that it was filed within 10 days of the judgment. A movant under Rule 59 has a lesser burden than under Rule 60(b). Reversal is appropriate "to prevent manifest injustice," whereas a showing of exceptional circumstances is required under Rule 60. The court of appeals emphasized that a chancellor is better informed to reach a decision in the child's best interest if there is evidence from all parties. There was no sound reason to deny the mother an opportunity to present evidence.

2. Rule 60(b)

Warner v. Thomas, 281 So. 3d 216 (Miss. Ct. App. 2019). A mother seeking to modify joint physical custody argued that a confrontation at a ballgame was a material change in circumstances. She presented no witnesses to the incident. After the court ruled against her, she filed a motion to reconsider, stating that she had located a witness. The court of appeals noted that motions to reconsider do not exist under the civil rules, treating the motion as one under rule 60(b)(3) to set aside based on newly-discovered evidence. However, to obtain a new trial on that basis, the petitioner must show that the evidence could not have been discovered by due diligence prior to trial. The mother did not provide any information to show why she could not have located the witness earlier.

Vandenbrook v. Vandenbrook, 292 So. 3d 991 (Miss. Ct. App. 2019). A court was not required to reopen a case to allow a father to present additional documentary evidence and witnesses to explain his W-2 form. The meaning of the document's figures was an issue at trial. There was no showing why the father could not have provided this evidence during trial.

Hall v. Hall, 281 So. 3d 211 (Miss. Ct. App. 2019). A husband's 2017 petition to modify his 2006 divorce judgment was not filed within a reasonable time. At divorce, the wife was awarded $600 a month from his pension, reflecting a portion of the pension growth during the marriage. The projection at that time was that as of the date of marriage, the monthly pension was expected to be $4,208 a month, while at the date of divorce, it was projected to be $5,212. The husband received notice in December of 2007 that his pension would be frozen. As a result, it was now anticipated that the pension would be between $3,366 and $4,004. In 2017, he petitioned for modification

of the decree, arguing that a material and substantial change had taken place. The court held that it was unreasonable to delay filing his petition for almost ten-years after learning that his pension had been frozen.

J. Appeals

1. Waiver of argument on appeal

Sanders v. Sanders, 281 So. 3d 1043 (Miss. Ct. App. 2019). A father waived his argument that a local rule was unapproved by failing to raise the issue at trial. After he and his wife entered an agreed order that their request for temporary custody would be decided based on affidavits, the court awarded temporary custody to his wife. On appeal, he argued that the chancery court district enforced an unapproved local rule requiring temporary custody to be decided by affidavit. The court rejected his argument for several reasons. The submission of affidavits was by agreement. Nothing in the record showed that there was such a local rule. Even if there was an unapproved rule, he made no request to present witnesses or testimony. And, he showed no prejudice.

2. Cross-appeals

Martin v. Borries, 282 So. 3d 472 (Miss. Ct. App. 2019). The court of appeals refused to consider a mother's arguments of error in the father's appeal of a modification action. Because she did not file a cross-appeal, the issues were not before the court.

3. Finality of judgments

In re C.R., No. 2017-CA-00911-COA, 2019 WL 6873730 (Miss. Ct. App. Dec. 17, 2019). The court of appeals lacked jurisdiction to hear a father's appeal from a youth court's adjudication order finding his children to be abused. After entering the adjudication order, the court declined to hold a disposition hearing and relinquished jurisdiction to a chancery court. Even though there may be an interim period between adjudication and disposition, they are part of the same proceeding for purposes of appeal. The case was not ripe for appeal until a youth court or chancery court entered a disposition order following a hearing.

Montgomery v. Montgomery, 281 So. 3d 171 (Miss. Ct. App. 2019). The court of appeals dismissed as premature a wife's appeal from a chancellor's grant of divorce against her based on habitual, cruel, and inhuman treatment. Although the chancellor granted a final judgment of divorce the judgment stated that he reserved jurisdiction to consider property division at a later date. The court did not certify the judgment as interlocutory under Miss. R. Civ. P. 54.

Britt v. Holloway, No. 2017-CA-01288-COA, 2019 WL 192350 (Miss. Ct. App. Jan. 15, 2019). The court of appeals dismissed a mother's appeal from an order granting custody of her daughter to the maternal grandmother. The chancellor addressed custody but reserved ruling on the grandmother's request for child support for six months. The court held that the judgment was not final.

4. Mandate on remand

Griner v. Griner, 282 So. 3d 1243 (Miss. Ct. App. 2019). A chancellor erred in disregarding the court's mandate on remand from the first appeal of this case. The husband appealed from the court's division of marital assets. The court of appeals reversed and remanded and assessed all costs of appeal to the wife. On remand, the chancellor denied the husband's motion for recovery of appellate costs. The court of appeals held that a mandate must be followed without deviation – a chancellor has no discretion in whether to follow an appellate court's mandate.

XIII. ATTORNEYS' FEES

A. Findings of fact

Vandenbrook v. Vandenbrook, 292 So. 3d 991 (Miss. Ct. App. 2019). The court of appeals reversed a chancellor's award to a wife of $29,346 in attorneys' fees for failure to make specific findings regarding the wife's inability to pay. The chancellor stated that the wife was unable to pay her fees, but offered no analysis of her financial condition to support the conclusion. The court also noted that the husband had supplemented the appeal record to show that the wife had filed for bankruptcy pending the appeal and had obtained a discharge of the attorneys' fees. The chancellor was instructed to consider the bankruptcy filing on remand.

Abercrombie v. Abercrombie, 282 So. 3d 763 (Miss. Ct. App. 2019). The court of appeals reversed and remanded a chancellor's award of attorneys' fees to a father for findings of fact. It was not clear whether the award was based on his inability to pay or a finding that the mother's motion was frivolous.

B. Inability to pay

Alford v. Alford, No. 2017-CA-01075-COA, 2019 WL 3297142 (Miss. Ct. App. July 23, 2019), *rev'd on other grounds,* No. 2017-CT-01075-SCT (Miss. June 4, 2020). The court of appeals reversed and rendered a chancellor's award of $6,000 in expert fees and $5,000 of a wife's $25,000 in attorneys' fees. She received bank accounts with a $17,000 balance and a Merrill Lynch account with a balance of $134,1115. Her attorney testified that if she was awarded one half of the assets – as she was – she would be able to pay her attorneys' fees. The court held that the record did not establish her inability to pay. The supreme court affirmed the court of appeals decision.

Chism v. Chism, 285 So. 3d 656 (Miss. Ct. App. 2019). A wife was properly awarded $27,582 in attorneys' fees in a multi-year, contentious divorce proceeding in which the husband was held in contempt twice. The chancellor did not abuse his discretion in finding that she was unable to pay her attorneys' fees, in spite of a substantial award of lump sum alimony and property division payable over time. Nor did the court err in awarding her $3,891 in attorneys' fees related to post-divorce motions.

Wilkinson v. Wilkinson, 281 So. 3d 153 (Miss. Ct. App. 2019). A chancellor properly awarded a wife one-third of her attorney's fees in a custody modification and contempt matter. The chancellor found that her monthly expenses were equal to or exceeded her income, while the husband's expenses were less than his income and he received a substantial tax refund.

C. Proof of amount of fees

Brown v. Hewlett, 281 So. 3d 189 (Miss. Ct. App. 2019). The court of appeals rejected a mother's argument that a chancellor should have required an itemized statement and made *McKee* findings of fact before awarding her ex-husband $5,000 in attorneys' fees in a contempt action. The chancellor found that the fee was "more than reasonable and probably not enough" for an action that involved multiple hearings. A chancellor may determine that fees are reasonable without an itemized statement based on the information before the court and the court's opinion based on experience and observation. The court of appeals agreed that the record supported the award.

D. In contempt actions

Hayes v. Hays, 281 So. 3d 1002 (Miss. Ct. App. 2019). A chancellor's award of attorneys' fees to a father in post-divorce litigation was affirmed. The chancellor found the mother in constructive criminal contempt for interference with visitation and modified custody to the father. The court awarded him $5,500 in fees related to the contempt proceeding and $3,781 in guardian ad litem fees necessitated by her filing of unsubstantiated abuse claims. The court of appeals rejected her argument that the chancellor erred in awarding him fees because, having failed to pay her attorneys' fees as ordered at divorce, he had unclean hands. The chancellor was within his discretion in declining to find the father in contempt. The chancellor correctly noted that he did owe the fees and that she had a judgment that she could pursue against him.

Wilkinson v. Wilkinson, 281 So. 3d 153 (Miss. Ct. App. 2019). A chancellor properly awarded a mother $3,700 in attorneys' fees in a successful contempt petition, based on her attorney's testimony that twenty percent of his total hours were related to the contempt petition and the chancellor's finding that $225 an hour was customary. No *McKee* analysis was necessary to award fees in a contempt action.

E. Rule 11 fee awards

Wilson v. Wilson, 283 So. 3d 195 (Miss. Ct. App. 2019). The court of appeals affirmed a chancellor's award of $9,000 in attorneys' fees to a former wife who was granted summary judgment in an action by her ex-husband and his current wife for an injunction against her. They failed to properly investigate their claim and did not provide evidence to support their general allegations. In addition, the fact that they dismissed their action against her sister — against whom they possibly had a claim – and not her, showed their improper motive for the action.

Blevins v. Wiggins, 284 So. 3d 808 (Miss. Ct. App. 2019). A mother seeking modification of child support sought attorneys' fees expended in defending against the father's counterclaim for custody, which she claimed was filed to harass her financially. The court of appeals held that the chancellor properly denied her request. The father, who had the children forty percent of the time, testified that they had been with their mother since the divorce ten years earlier and that he would love to have the chance to raise them as well.

F. Unsubstantiated abuse allegations

Garner v. Garner, 283 So. 3d 120 (Miss. 2019). A chancellor properly awarded an uncle attorneys' fees in a custody modification action for time spent defending a mother's unsubstantiated allegations that he had sexually abused her son. Fees are sometimes denied when unproven allegations are linked to evidence from which a party might have suspected abuse. In this case, there was no basis for the allegations.

G. Fees on appeal

Brown v. Hewlett, 281 So. 3d 189 (Miss. Ct. App. 2019). The court of appeals noted that a successful appellant is typically awarded attorneys' fees of one half of the amount awarded by the trial court. However, the court denied the request for fees without prejudice to allow the appellant to file a motion for fees in compliance with MISS. R. APP. P. 27(a). Three judges joined in a concurrence that called for the court to overrule the long-standing practice of awarding one half of the trial court's fees to a successful appellant. The concurring opinion pointed out that the rules of professional responsibility require that an attorney's fee be reasonable, MISS. R. PROF. RESP. 1.5, a requirement that the one-half rule does not further. An appeal might not require fifty percent of the work for a complex trial. Or, an appeal on a difficult issue of law might require much more work than fifty percent of the trial time. The judges urged that the court require that appellants support their request for fees using the *McKee* factors.

Wilkinson v. Wilkinson, 281 So. 3d 153 (Miss. Ct. App. 2019). The court of appeals noted that it generally awards a successful appellant attorneys' fees of one half of the amount awarded by the trial court. However, the court denied the request without prejudice to allow the appellant to file a motion for fees in compliance with MISS. R. APP. P. 27(a).

Kaiser v. Kaiser, 281 So. 3d 1136 (Miss. Ct. App. 2019). The court of appeals declined to award a wife attorneys' fees on appeal. At the trial below, she was awarded attorneys' fees necessitated by her husband's delays. The fees were not awarded based on inability to pay. The court held that where trial fees are based on contempt and the finding of contempt is not appealed, fees should not be award for time spent on defending other issues on appeal.

Martin v. Borries, 282 So. 3d 472 (Miss. Ct. App. 2019). A mother was not entitled to attorneys' fees on her former husband's appeal of a child support modification judgment. She received attorneys' fees below based on the court's finding that the father was in contempt. However, he did not appeal the finding of contempt.

H. Guardian ad litem fees

Garner v. Garner, 283 So. 3d 120 (Miss. 2019). The supreme court reversed a chancellor's order that a mother pay a guardian ad litem's fees of $26,000. The court held that the child's custodian was entitled to an award for the time the guardian spent investigating the mother's unfounded allegations of abuse. However, the guardian was appointed prior to the allegations and spent time on other matters. The court reversed for the chancellor to determine the amount of fees related to other matters and to determine how the fees should be awarded.

CUSTODY ACTIONS VS. GAP ACT GUARDIANSHIP OF A MINOR: A COMPARISON

THIRD-PARTY CUSTODY ACTIONS

Prepared by Deborah H. Bell

GUARDIANSHIP OF MINORS

Prepared by David Calder

CUSTODY ACTIONS VS. GAP ACT GUARDIANSHIP OF A MINOR: A COMPARISON

Under Mississippi law, a nonparent may seek physical custody of a child in a chancery court custody proceeding. In the past, nonparents have also sought physical custody under guardianship laws. A nonparent may seek physical guardianship of a minor child under the new GAP Act. However, there are significant differences in the law governing guardianship under GAP and custody actions. These materials cover the standards, procedure, jurisdiction, obligations, modification, and termination rules under the two options. A chart included in the materials highlights the differences between custody and guardianship.

THIRD-PARTY CUSTODY ACTIONS

Prepared by Deborah H. Bell

I. TEST FOR AWARDING THIRD-PARTY CUSTODY

A. Natural parent presumption

In a third-party custody action, a petitioner must ordinarily overcome the natural parent presumption by proving that the parent has abandoned or deserted the child or is unfit. If the third party overcomes the presumption, the court proceeds to an *Albright* analysis to determine whether the child's best interest requires placement with the parent or the third party. *Wilson v. Davis*, 181 So. 3d 991, 995 (Miss. 2016).

Abandonment is defined as "any course of conduct on the part of a parent evincing a settled purpose to forgo all duties and relinquish all parental claims to the child." It may consist of a single act or a series of actions. Failure to provide financial support for a child is not, in itself, abandonment. *Ethredge v. Yawn*, 605 So. 2d 761, 765 (Miss. 1992); *In re* Adoption of A Female Child, 412 So. 2d 1175, 1178 (Miss. 1982).

Desertion appears less frequently as a basis for overcoming the presumption. In a 2010 case, the court of appeals distinguished abandonment and desertion -- abandonment involves relinquishment of rights, while desertion involves inaction or avoidance of a duty. Desertion may involve behavior different from abandonment or constructive abandonment. Applying this test, a father who allowed his daughter to remain with her grandmother for four years, visiting sporadically, deserted her. The court also noted that a chancellor may still consider as a factor in the analysis the interest in preserving the natural parent relationship. *Vaughn v. Vaughn*, 36 So. 3d 1261, 1265-66 (Miss. 2010); *see also* Flynn v. Bland, 213 So. 3d 85, 89 (Miss. Ct. App. 2016) (finding father deserted the child by failing to support or visit her until eight years after her birth); Hamilton v. Houston, 100 So. 3d 1005, 1010-11 (Miss. Ct. App. 2012) (mother who lived with boy for only three months and provided no financial support deserted son) (*Albright* analysis applied after finding of desertion by clear and convincing evidence); *In re* Custody of Brown, 66 So. 3d 726, 729 (Miss. Ct. App. 2011) (remanding to determine whether father deserted child).

Unfitness or immorality. To award custody to a third party based on parental unfitness, a court must find that a parent engaged in conduct presenting a genuine serious danger to a child. Proof that a parent was occasionally intoxicated or had a past history of drug use was not sufficient to justify third-party custody. *See Sellers v. Sellers*, 638 So. 2d 481, 487 (Miss. 1994) (use of marijuana discontinued); *Westbrook v. Oglesbee,* 606 So. 2d 1142, 1145 (Miss. 1992) (past drug habit, occasional intoxication). A parent who exhibits some undesirable behavior or lacks exemplary parenting skills is not necessarily unfit or so immoral that they should not have custody. Awarding custody to grandparents based on a finding that a father was "unprepared" to

take custody as opposed to "unfit" was reversible error. *Carter v. Taylor*, 611 So. 2d 874, 876 (Miss. 1992).

In contrast, paternal grandparents were properly granted custody of a child who had been sexually abused while in the care of a bipolar, schizophrenic mother who did not take her medication regularly. *E.J.M. v. A.J.M.*, 846 So. 2d 289, 294 (Miss. Ct. App. 2003); *see also Loomis v. Bugg,* 872 So. 2d 694, 696-97 (Miss. Ct. App. 2004) (custody to child's paternal aunt; mother had history of illegal drug use, unstable employment, frequent moves, and multiple relationships). Similarly, a father who abused alcohol and drugs, was abusive to his son, and failed to report his girlfriend's disappearance was found to be unfit. *In re Custody of M.A.G.,* 859 So. 2d 1001, 1005 (Miss. 2003); *see also S.C.R. v. F.W.K.,* 748 So. 2d 693, 701 (Miss. 1999) (presumption of parental fitness rebutted where father instructed young child to lie and fabricate charges of sexual abuse); *Burge v. Burge*, 223 So. 3d 888, 900 (Miss. Ct. App. 2017) (custody to step-father; presumption was rebutted by proof that the mother violated court orders not to expose children to her boyfriend who suffered from PTDS and alcoholism); *Randallson v. Green,* 203 So. 3d 1190, 1197 (Miss. Ct. App. 2016) (parents found unfit based on mother's depression, physical violence, and suicide threats; failure to take child for medical treatment; and uninhabitable home contaminated with animal feces, vomit, rats, fleas, and filth).

B. Constructive abandonment

In 2002, the court of appeals held that the natural parent presumption does not apply when a parent "constructively abandons" a child. The catalyst for this doctrine was a custody dispute between grandparents and a mother who left her child with them for eleven years under a temporary custody order. The mother did, however, maintain contact and visit, preventing a finding of actual abandonment. The court of appeals defined constructive abandonment as "voluntary abandonment of parental responsibility" and removal from "active participation in a child's life" for so long that the effect is the same as actual abandonment. A parent who has constructively abandoned a child may regain custody only by showing by clear and convincing evidence that it is in the child's best interests. *Hill v. Mitchell,* 818 So. 2d 1221, 1226 (Miss. Ct. App. 2002) (court noted that constructive abandonment may require a longer period than actual abandonment).

C. Exceptional circumstances test

In a 2016 custody action between a father and a maternal grandmother, the supreme court added a new test for determining whether the natural parent presumption has been rebutted. The court emphasized that in limited exceptional circumstances, rigid adherence to the four-factor formula of abandonment, desertion, unfitness, and immorality is insufficient to protect children. The court held that the presumption may be overcome by proof of the four traditional factors *or* proof of exceptional circumstances in which "actual or probable, serious physical or psychological harm or detriment will occur to the child" so that third party custody is "substantially necessary" to prevent that harm. The court also held that a chancellor who grants custody to a third party under the exceptional circumstances test must make "very specific" findings. *Wilson v. Davis*, 181 So. 3d 991, 995, 997, 1000 (Miss. 2016).

D. History of family violence

Although not stated as a separate third-party custody test, third parties have gained custody of children of parents who are engaged in a physically violent relationship, based on the statutory presumption against custody to a parent with a history of family violence. MISS. CODE ANN. § 93-5-24.

In two cases, victims of violence lost custody to grandparents based on the presumption. A teenaged girl's maternal grandparents prevailed in a custody action against her parents, who were married and living together. The father had a history of violence against the mother and once struck his daughter. The chancellor held that the parents failed to rebut the presumption against awarding custody to a parent with a history of family violence. *J.P. v. S.V.B.,* 987 So. 2d 975, 980-83 (Miss. 2008) (mother was not considered suitable for custody because she resided with the father and rationalized his behavior). And custody was awarded to paternal grandparents over their son and daughter-in-law, based on the daughter-in-law's history of family violence against their son as well as her former husband. *Randallson v. Green*, 203 So. 3d 1190, 1197 (Miss. Ct. App. 2016) (also based on parental unfitness).

II. JURISDICTION AND PROCEDURE

A. Cause of action

A custody action between a grandparent and a parent should be filed under the statutory independent custody action, MISS. CODE ANN. § 93-11-65, which provides that, in addition to awarding custody and support at divorce, "the chancery court of the proper county shall have jurisdiction to entertain suits for the custody, care, support and maintenance of minor children and to hear and determine all such matters, and shall, if need be, require bond, sureties or other guarantee to secure any order for periodic payments for the maintenance or support of a child. . . . . Proceedings may be brought by or against a resident or nonresident of the State of Mississippi, *whether or not having the actual custody of minor children*, for the purpose of judicially determining the legal custody of a child." (emphasis added).

B. Jurisdiction

Jurisdiction in custody actions is governed by the Uniform Child Custody and Jurisdiction Enforcement Act (UCCJEA), which puts jurisdiction in the child's home state. In some circumstances, a court in a state with significant connections to the action may take jurisdiction. And courts may take temporary emergency jurisdiction based on a child's presence in the state if there are allegations of abuse.

Home state jurisdiction. A court has home state jurisdiction over a child who lived in the state with a parent or "person acting as a parent" for at least six consecutive months preceding the action or, if the child is under six months old, since birth. Temporary absences during the six-month period are counted as part of the six months. A court has home state jurisdiction if (1) this definition is met on the date the proceeding commences or (2) the state was the child's home state within the last six months and a parent remains in the state. MISS. CODE ANN. § 93-27-201(1).

Significant connection jurisdiction. A court may exercise jurisdiction under the significant connections test if no state has home state jurisdiction or if the child's home state declines to exercise jurisdiction. A court has significant connections jurisdiction if (1) the child and at least one contestant have a significant connection with the state other than "mere physical presence" and (2) substantial evidence related to the action is available in the state. MISS. CODE ANN. § 93-27-201(1)(b).

Emergency jurisdiction. A state may exercise temporary emergency jurisdiction over a child who is physically present in the state and who has been abandoned or needs protection because of an emergency related to mistreatment or abuse of the child or a sibling or parent of the child. MISS. CODE ANN. § 93-27-204(1); *see In re* Adoption of D.N.T., 843 So. 2d 690, 704 (Miss. 2003) (Mississippi had jurisdiction to issue initial order under UCCJA emergency provision, even though Arizona was the child's home state; mother's consent to an adoption in Mississippi constituted abandonment). Because the emergency provision includes abuse of a parent, a court may award emergency custody in a proceeding for protection from domestic violence, even if home state jurisdiction lies in another state. If there is an outstanding custody order, or custody proceedings have begun in a court with jurisdiction under the Act, the emergency order must specify a period of time within which the petitioner must obtain an order from the state with jurisdiction. MISS. CODE ANN. § 93-27-204(3). If there is no outstanding order and no order is subsequently sought, the temporary order may become permanent. *Id.* § 93-27-204(2).

C. Venue

Venue for independent custody actions lies in the county where the child lives, the county where the person with actual custody resides, or in the county where the defendant resides. MISS. CODE ANN. § 93-11-65(1)(a).

D. Personal jurisdiction

Today, most matters with regard to children are considered adjudications of status. In most states, courts may enter orders related to custody, visitation, abuse or neglect, termination of parental rights, or adoption without personal jurisdiction over the defendant, so long as the defendant was properly served. The drafters of the UCCJEA made clear that personal jurisdiction was not required for actions covered by the act. *See* Unif. Child Custody Jurisdiction Act § 12 cmt (1999) (custody determinations, as distinguished from support actions, are proceedings in rem or proceedings affecting status). Surprisingly, Supreme Court authority on the issue is unclear. In a 1953 case, *May v. Anderson,* the Court held that a custody action required personal jurisdiction, relying on cases involving financial rights. 345 U.S. 528, 533 (1953) (mother's right to custody is a personal right entitled to at least as much protection as her right to alimony). Subsequently, (but without overruling *May*) the Court recognized the status exception to personal jurisdiction, stating, **"**We do not suggest that jurisdictional doctrines . . . such as the particularized rules governing adjudications of status, are inconsistent with the standard of fairness." *Schaffer v. Heitner*, 433 U.S. 186, n. 30 (1978). The opinion cited as support a law review article which argued that states must be able to address custody, termination of parental rights, and adoption even in the absence of personal jurisdiction over the defendant. *See* Traynor,

Is This Conflict Really Necessary?, 37 TEX. L. REV. 657, 660-662 (1959). And, in *Stanley v. Illinois,* the Court implicitly upheld a state's right to remove children from a parent based on service through publication. *Stanley v. Illinois,* 405 U.S. 645, n. 9 (1972).

E. Service of process

Rule 81 summons. Service of process should be made using a Rule 81 summons. Rule 81(d) (1) provides, "the following actions and matters shall be triable 30 days after completion of service of process in any manner other than by publication or 30 days after the first publication where process is by publication, to-wit: . . . child custody actions; child support actions . . . ."

By publication. MISS. CODE ANN. § 93-11-65(1)(a) provides, "Process shall be had upon the parties as provided by law for process in person or by publication, if they be nonresidents of the state or residents of another jurisdiction or are not found therein after diligent search and inquiry or are unknown after diligent search and inquiry." Under the UCCJEA, service must be "reasonably calculated to give actual notice," but may be by publication if other means cannot be used. MISS. CODE ANN. § 93-27-108(1).

Waiver of notice. No notice is required if a party submits to the jurisdiction of the court. MISS. CODE ANN. § 93-27-108(3). Inadequate notice is waived by the defendant's failure to object at trial, *see Dep't of Human Servs. v. Marquis,* 630 So. 2d 331, 335 (Miss. 1993) (while in personam jurisdiction may be waived, defendant preserved the objection); *Mitchell v. Mitchell*, 767 So. 2d 1078, 1085 (Miss. Ct. App. 2000) (whether a person may raise personal jurisdiction as an issue "depends entirely on when it was raised") or by entry of a general appearance. *See Peters v. Peters,* 744 So. 2d 803, 807 (Miss. Ct. App. 1999) (Virginia mother who entered a general appearance in a Mississippi divorce action submitted to personal jurisdiction for purposes of child support and custody issues).

F. Parties

The UCCJEA requires that notice and an opportunity to be heard be given to parents whose rights have not been previously terminated, persons with physical custody of a child, and any persons entitled to notice in a child custody proceeding. MISS. CODE ANN. § 93-27-205. A child is not a party in a custody proceeding.

G. Pleadings

A nonparent seeking custody under MISS. CODE ANN. § 93-11-65 should file a petition for custody, accompanied by a UCCJEA affidavit.

H. Hearings

There are no statutory requirements for attendance at hearings.

I. Guardian ad litem

Courts must appoint a guardian ad litem in custody cases under the independent custody statute when allegations of abuse and neglect are made, MISS. CODE ANN. § 93-11-65. Failure to appoint a guardian under a mandatory statute requires reversal. *In re* Adoption of E.M.C., 695 So. 2d 576, 581 (Miss. 1997). In cases not involving allegations of abuse or neglect, appointment of a guardian ad litem is solely within the chancellor's discretion.

III. RIGHTS AND OBLIGATIONS OF CUSTODIAN

A third party who is awarded custody of a child under MISS. CODE ANN. § 93-11-65 is not subject to ongoing oversight by the court or any other body. The custodian would have the obligation to provide basic care and support for the child while their custody continued, and would be subject to removal of the child based on abuse or neglect. Otherwise, there is no structured oversight or reporting required in connection with an award of custody unless ordered by the court in the custody action.

A nonparent custodian of a child who acts in loco parentis during their period of custody does not have an ongoing support obligation when the period of custody ends. The Mississippi Supreme Court recently clarified the obligation of one who acts in loco parentis. A man and his wife agreed to take legal custody of her great-grandson. When they divorced, he agreed to pay child support for the boy. The supreme court held that he had no ongoing support obligation merely as a result of having acted in loco parentis to the boy, in the absence of a knowing and voluntary assumption of the support obligation. To so hold would deter generous family and friends from offering to take custody of children in need of a temporary home. *Dennis v. Dennis,* 234 So. 3d 371, 378 (Miss. 2017).

A non-parent may, however, assume a support obligation by agreement. The step-great-grandfather in *Dennis* was not entitled to terminate the support unilaterally. While he had no support obligation when his in loco parentis status ended, he voluntarily agreed to provide support as a contractual obligation in his divorce. Absent fraud or overreaching, he was not entitled to set the agreement aside. *Id.*

IV. SUPPORT FROM PARENTS

Cause of action. A child's parents may be ordered to pay support to third-party custodians of their child. Parents who were found to be unfit were ordered to pay support to the child's
paternal grandmother, who had custody during the school year, and maternal great-grandparents, who had custody during the summer. *Darby v. Combs,* 229 So. 3d 136, 147-48 (Miss. Ct. App. 2016), *aff'd*, 229 So. 3d 108 (Miss 2017). Third-party actions for support are also brought under MISS. CODE ANN. § 93-11-65.

Personal jurisdiction required. A petition for child support must be based upon personal jurisdiction and personal service of process. The Uniform Interstate Family Support Act (UIFSA) provides expanded bases for personal jurisdiction with regard to child support orders, including

some that arguably require less than minimum contacts. The Mississippi Supreme Court has indicated, however, that it will continue to apply traditional requirements of minimum contacts in child support actions in spite of the expanded provisions of UIFSA. *See McCubbin v. Seay*, 749 So. 2d 1127, 1129 (Miss. Ct. App. 1999). Service of process in child support actions must be by personal service, *O'Neill v. O'Neill*, 515 So. 2d 1208, 1211 (Miss. 1987), through a Rule 81 summons. MISS. R. CIV. P 81(D).

V. PARENT'S ACTION TO TERMINATE THIRD-PARTY CUSTODY

When a parent seeks to regain custody, the applicable standard depends on whether the third party was awarded custody by a court or the parent agreed to custody.

A. Custody to third party by agreement

In 2000, in *Grant v. Martin,* the Mississippi Supreme Court established the test for modifying custody after a parent has agreed in a legal proceeding to custody in a third party. A mother sought to regain custody of children after she and her husband relinquished custody to his parents in their divorce action. The court held that parents who voluntarily relinquish legal custody of their children can reclaim custody only upon showing by clear and convincing evidence that the change in custody is in the child's best interests. *Grant v. Martin*, 757 So. 2d 264, 266 (Miss. 2000); *cf. Schonewitz v. Pack*, 913 So. 2d 416, 422 (Miss. Ct. App. 2005) (mother did not voluntarily relinquish custody when grandparents were awarded guardianship in a proceeding without notice to her). In a subsequent application of this exception, the court of appeals held that a chancellor properly refused to modify custody from the paternal grandparents to the natural mother, who voluntarily relinquished custody of a child in divorce proceedings. The mother failed to show that the child's best interest would be served by returning custody to her – the child was thriving in a stable, secure environment. *Callahan v. Davis*, 869 So. 2d 434, 437 (Miss. Ct. App. 2004); *see also Patrick v. Boyd*, 198 So. 3d 436, 444 (Miss. Ct. App. 2016) (mother who relinquished custody to her mother lost presumption) (but awarding custody to child's father, now her husband); *Wright v. Bishop*, 160 So. 3d 737, 742 (Miss. Ct. App. 2015) (after mother agreed to custody in third parties, court erred in returning custody because mother was fit and could resume care for the child). The rule does not apply to parents whose children have been removed from them involuntarily. A father whose children were placed in foster care by the Department of Human Services did not voluntarily relinquish custody. *Barnett v. Oathout*, 883 So. 2d 563, 569 (Miss. 2004) (requiring proof of material change in circumstances to modify custody).

B. Court-ordered custody to third party

In 2010, the Mississippi Court of Appeals held that a parent who seeks to modify court-awarded third-party custody that was based on unfitness must prove a material change in circumstances in the third-party custodian's home. The fact that the mother had undergone rehabilitation, was working, attending church, and lived in a nice home, was not a basis for modifying custody. The court distinguished the situation in which a parent voluntarily

relinquishes custody, in which case the *Grant v. Martin* standard applies. The court analogized the case to one in which DHS has placed a child in the custody of a third party, requiring proof of a material adverse change for the natural parent to regain custody. *Adams v. Johnson,* 33 So. 3d 551, 555 (Miss. Ct. App. 2010).

C. Custody to parent

When a parent and third party litigate custody, the parent retains custody, and the third party again seeks custody, a higher burden applies. After a mother and grandparents resolved a custody action by agreeing that the mother would keep custody, the grandparents filed a modification action seeking custody. In these circumstances, the supreme court held, the third party must prove that (1) a material adverse change in circumstances has occurred; (2) the natural parent presumption has been rebutted; and (3) the best interest of the child is served by the custody award. *Irle v. Foster,* 175 So. 3d 1232, 1235-36 (Miss. 2015). Applying this test, a court modified custody to a boy's step-uncle, who had previously had custody for several years before agreeing to return custody to the mother. The court found that the mother's failure to continue her son's court-ordered psychological treatment, history of drug and alcohol abuse, violent marriage, refusal to seek treatment for depression and bipolar disorder, and unsubstantiated reports of child sexual abuse against the uncle, constituted a material change in circumstances that made her unfit for custody. *Garner v. Garner*, 283 So. 3d 120, 128, 145 (Miss. 2019).

GUARDIANSHIP OF MINORS

Prepared by David Calder

I. TEST FOR AWARDING GUARDIANSHIP

Under the GAP Act, the new statutes only provide for a guardianship in limited situations, "when it is the minor's best interest." In actions in which the parents do not consent, a guardian may be appointed when no parent is "willing or able" to exercise the powers that a guardian would be granted. The exact meaning of this language is not clear.

MISS. CODE ANN. § 93-20-201. Basis for appointment of guardian for minor, provides:
(1) A person becomes a guardian for a minor only on appointment by the court.
(2) The court may appoint a guardian for a minor who does not have a guardian if the court finds the appointment is in the minor's best interest, and:
(a) Each parent of the minor, after being fully informed of the nature and consequences of guardianship, consents;
(b) All parental rights have been terminated; or
(c) There is clear and convincing evidence that no parent of the minor is WILLING OR ABLE to exercise the powers the court is granting the guardian.

Standard under prior law. The standard under the old guardianship statutes authorized a guardianship over the "person" of the child (thereby awarding "custody") if the trial court found that the parent was **"unsuitable"** to have custody of the child under MISS. CODE ANN. § 93-13-5 (guardianship over a minor's person is improper unless the parents are proven to be unsuitable).

MISS. CODE ANN. § 93-13-5 (which has now been repealed) specifically provided: The guardian of a ward whose father or mother is living, and a suitable person to have the custody of the ward, shall not be entitled, as against the parent, to the custody of the ward, but the guardian of a ward who has no parent shall be entitled to the custody of a ward as well as of his estate, or the court or chancellor may appoint one (1) person to be guardian of the person, and another to be guardian of the estate of the ward.

The standard for determining "unsuitability" under MISS. CODE ANN. § 93-13-5 had been interpreted by the courts using the traditional test for rebutting the natural parent presumption which requires clear and convincing evidence showing that: "(1) the parent has abandoned the child, (2) immoral conduct by the parent is detrimental to the child, or (3) the parent is unfit to have custody of the child." *In re Guardianship of Williams*, 930 So.2d 491, 495-96 (¶ 22) (Miss. App. 2006).

MISS. CODE ANN. § 93-13-5 has been repealed, and there is no provision comparable to that section contained in the new GAP Act. Therefore, if a parent contests the guardianship, it is questionable whether the courts will construe the "willing and able" provision in § 93-20-

201(2)(c) to allow a third party to assert that the biological parent is "unfit" under the traditional test to rebut the natural parent presumption.

However, MISS. CODE ANN. § 93-13-1 **has not been repealed**, and it provides:

> … But if any father or mother be unsuitable to discharge the duties of [the natural parent] guardianship, then the court, or chancellor in vacation, may appoint some suitable person, or having appointed the father or mother, may remove him or her if it appear that such person is unsuitable, and appoint a suitable person. MISS. CODE ANN. § 93-13-1.

Therefore, it appears that the "suitable" requirement in MISS. CODE ANN. § 93-13-1 must be read in conjunction with MISS. CODE ANN. § 93-20-201 in the new act. This would allow a contested proceeding to establish a guardianship for a minor using existing case law, where the guardian would have to show by clear and convincing evidence that the parent is not a "suitable" guardian for the child. Under this standard, the traditional test for rebutting the natural parent presumption is used to show pthat the parent is not suitable to retain custody. See *In re Guardianship of Williams*, 930 So.2d 491, 495-96 (¶¶ 22-25) (Miss. Ct. App. 2006); *Carter v. Taylor*, 611 So.2d 874, 876-77 (Miss.1992).

II. JURISDICTION AND PROCEDURE

A. Cause of action

A guardianship action for a minor can be filed by "any person" interested in the welfare of the minor under the GAP Act, MISS. CODE ANN. § 93-20-202. The "definitions" section of the GAP Act includes the following: " 'Person' means an individual, estate, business or nonprofit entity, public corporation, government or governmental subdivision, agency, or instrumentality, or other legal entity." MISS. CODE ANN. § 93-20-102(p) (June 2020 Amendments). It is unclear whether this was intended to give these entities standing to file petition for a guardianship, in addition to individuals.

B. Jurisdiction

Jurisdiction lies in chancery court. MISS. CODE ANN. § 93-20-104 provides: "Except to the extent jurisdiction is precluded by the Uniform Child Custody Jurisdiction and Enforcement Act (Title 93, Chapter 27, Mississippi Code of 1972), the chancery court has jurisdiction over a guardianship or conservatorship for a respondent domiciled or present in this state or having property in this state." The chancery court has "exclusive jurisdiction" to determine the need for the guardianship or conservatorship, and the administration once established.

The general GAP Act provision on venue could potentially conflict with the requirements under the UCCJEA. The jurisdiction statute, MISS. CODE ANN. § 93-20-104, provides: "Except to the extent jurisdiction is precluded by the Uniform Child Custody Jurisdiction and Enforcement Act (Title 93, Chapter 27, Mississippi Code of 1972), the chancery court has

jurisdiction over a guardianship or conservatorship for a respondent domiciled or present in this state or having property in this state." However, MISS. CODE ANN. § 93-20-202 requires that the guardianship Petition include a UCCJEA affidavit. So it appears that the jurisdictional provisions in the UCCJEA will control, if the case involves interstate issues.

Under the UCCJEA, jurisdiction and the proper forum state are addressed in MISS. CODE ANN. § 93-27-201 which provides that a custody action must be filed in the "home state" of the child. Specific facts are relevant to resolving this question, such as prior proceedings, continuing jurisdiction, and the current residency of the parents.

C. Venue

Venue for guardianship for a minor is established under MISS. CODE ANN. § 93-20-106(1) in:(a) the county where the minor resides or is present when the case is filed; or

(b) the county where another proceeding concerning the custody or parental rights of the minor is pending.

Transfer of venue: MISS. CODE ANN. § 93-20-105(2) provides for both intrastate and interstate transfer of a case to an appropriate county or state if it is in the best interest of the ward. The transfer statute does not apply to adult guardianships that are subject to the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act, which remains in force, and has detailed provisions for interstate transfer of adult guardianships. MISS. CODE ANN. § 93-14-101, et seq.

D. Personal jurisdiction

: MISS. CODE ANN. § 93-20-104 provides: "… the chancery court has jurisdiction over a guardianship or conservatorship for a respondent domiciled or present in this state or having property in this state."

E. Service of process

Service of process is by a Rule 81(d) summons served at least seven days prior to the hearing.

Under the terms of the GAP Act that became effective on January 1, 2020, the terms "summons" and "service of process" were not used. Instead, the Act provided for "Notice," without distinguishing when a Rule 81(d) summons was required, and when "notice" could be served pursuant to Rule 5 (by mail or electronically). This has now been clarified.

MISS. CODE ANN. § 93-20-203 now provides:
(1) If a petition is filed under Section 93-20-202, the court must set a date, time and place for a hearing, and the petitioner must cause summons to be issued and served not less than seven (7) days before the hearing, together with a copy of the petition, on each of the following who is not the petitioner:

Potential conflict: The amended statute requires 7 days notice of the time, date and place, so this would require using a Rule 81(d)(2) summons, which applies for temporary relief in child custody matters, and estate matters and wards' business in which notice is required but the time for notice is not prescribed by statute or by subparagraph (1) above." However, Rule 81(d)(1) requires 30 days notice for "child custody" actions. Since the GAP Act provides that a guardianship is an award of "child custody," this appears to be a conflict. Generally the rules take precedence over statutes in procedural matters. Newell v. State, 308 So. 2d 71 (Miss. 1975). However, Rule 81(a)(9) provides that the Rule has "limited applicability" to actions initiated under "Title 93 of the Mississippi Code of 1972," because these actions "are generally governed by statutory procedures." So the 7 day time for service specified in MISS. CODE ANN. § 93-20-203(1) arguably controls the time for service of process for a guardianship.

Summons by Publication: If a summons by publication is necessary to initiate the guardianship, Rule 81(d)(2) provides that the time required is 30 days from the date of the first publication. Given the nature of such a summons, and the fact that the statutory publication is necessary to satisfy due process requirements, it would appear that time specified in Rule 81(d)(2) would override the statute, if the summons must be issued by publication. In those situations, it might be necessary to consider requesting an Emergency Temporary Guardianship Without Notice, which could be effective for up to 60 days. See Miss. Code Ann. § 93-20-207. This would require a finding that appointment of an emergency guardian would likely prevent substantial harm to the minor's health, safety, or welfare, and that there was no other person who had authority and willingness to act in the circumstances.

Waiver of notice: Any person served to be with a summons or notice under the Act may elect to waive service under Rule 4 and 5, MRCP. However, the proposed ward may not waive service of process or any other notice required.

MISS. CODE ANN. § 93-20-114. WAIVER OF NOTICE.
Except as otherwise provided in this chapter, a person may waive notice under this chapter in a record signed by the person or person's attorney and filed in the proceeding. However, a respondent or ward may not waive notice under this chapter.

F. Parties

Parties include a minor over the age of 14, the minor's parents or an adult nearest in kinship, any person with primary care or custody for at least 60 days in the 6 months prior to the petition.

MISS. CODE ANN. § 93-20-203(1):
a. The minor, if age fourteen (14) or older at the time of the hearing;
b. Each parent of the minor who can be found with reasonable diligence c. If no parent or parent cannot be found then serve an adult nearest in kinship who can be found with reasonable diligence; and
d. Each individual who had primary care or custody of the minor for at least sixty (60) days during the six (6) months immediately before the filing of the petition.

Alternative service for minor. MISS. CODE ANN. § 93-20-203(4):
If a minor age 14 or older cannot be served, the chancellor may appoint a guardian ad litem for the purpose of receiving service of the summons on behalf of the minor.

Comment: The unanswered question is whether the guardian ad litem has any duty to take further action after receiving the summons, such as attempting to make contact with the minor to discuss the guardianship proceedings, or possibly requesting the appointment of counsel for the minor to oppose the guardianship under MISS. CODE ANN. § 93-20-204.

G. Pleadings

The GAP Act has some technical requirements for the Petition and a Notice of Hearing that is issued. In regard to the Petition for Guardianship, MISS. CODE ANN. § 93-20-203(3) provides: "A petition under this article must state the name and address of an attorney representing the petitioner, if any, and must set forth under the style of the case and **before the body of the petition the following language in bold or highlighted type: '**THE RELIEF SOUGHT HEREIN MAY AFFECT YOUR LEGAL RIGHTS. YOU HAVE A RIGHT TO NOTICE OF ANY HEARING ON THIS PETITION, TO ATTEND ANY SUCH HEARING, AND TO BE REPRESENTED BY AN ATTORNEY.' "

For any Notice of Hearing issued in the case, MISS. CODE ANN. § 93-20-113 provides: "Notice given of a hearing under this chapter must be in at least sixteen-point font, in plain language, and, to the extent feasible, in a language in which the person to be notified is proficient." Since the guardianship is initiated by way of a Rule 81 summons, it may be prudent to issue a Notice of Hearing that could be served with the Summons and Petition.

H. Hearings

The GAP Act includes a requirement of attendance at hearing for some parties.

Guardian must attend: MISS. CODE ANN. § 93-20-205(2). The person seeking to be appointed guardian must attend the hearing.

Parents may attend: MISS. CODE ANN. § 93-20-205(3). Parents have a right to attend hearing.

Minor must attend: The minor is required to attend the hearing , except under specific circumstances. Minor's age 14 and older must be allowed to participate in the hearing, unless the court determines by clear and convincing evidence that the minor has refused to participate; cannot attend; does not have the ability or maturity meaningfully participate, or that attendance would be harmful to the minor,

MISS. CODE ANN. § 93-20-205.
(1) The court shall require a minor who is the subject of a hearing for appointment of a guardian to attend the hearing and allow the minor to participate in the hearing unless the court determines, by clear and convincing evidence presented at the hearing or at a separate hearing, that:

(a) The minor consistently and repeatedly refused to attend the hearing after being fully informed of the right to attend and, if the minor is fourteen (14) years of age or older, the potential consequences of failing to do so;
(b) There is no practicable way for the minor to attend the hearing;
(c) The minor lacks the ability or maturity to participate meaningfully in the hearing; or
(d) Attendance would be harmful to the minor.

I. Guardian ad litem

A GAL may be appointed for any individual.

MISS. CODE ANN. § 93-20-115. GUARDIAN AD LITEM.
The court at any time may appoint a guardian ad litem for an individual. If no conflict of interest exists, a guardian ad litem may be appointed to represent multiple individuals or interests. The guardian ad litem may not be the same individual as the attorney representing the respondent. The court shall state the duties of the guardian ad litem and the reasons for the appointment.

III. RIGHTS AND OBLIGATIONS OF GUARDIAN

Order of appointment: The order of appointment may be for a full guardianship or a limited guardianship, and may provide that the parents have rights of visitation and decision-making concerning the minor. The order must also provide that the parents are entitled to notice of any change in the minor's residence address, or any subsequent order that limits the guardian's powers or removes the guardian. A testamentary guardianship is given preference, and then the court may consider the person nominated by the minor who is age 14 or older.

MISS. CODE ANN. § 93-20-206.
(1) After a hearing, the court may appoint a guardian for a minor, dismiss the proceeding, or take other appropriate action consistent with this chapter or law of this state other than this chapter.
(2) In appointing a guardian under subsection (1), the following apply:
(a) The court shall appoint a person nominated as guardian by a parent of the minor in a will or other record unless the court finds the appointment is contrary to the best interest of the minor.
(b) If multiple parents have nominated different persons to serve as guardian, the court shall appoint the nominee whose appointment is in the best interest of the minor, unless the court finds that appointment of none of the nominees is in the best interest of the minor.
(c) If a guardian is not appointed under paragraph (a) or (b), the court shall appoint the person nominated by the minor if the minor is fourteen (14) years of age or older unless the court finds that appointment is contrary to the best interest of the minor. In that case, the court shall appoint as guardian a person whose appointment is in the best interest of the minor.
(3) In the interest of maintaining or encouraging involvement by a minor's parent in the minor's life, developing self-reliance of the minor, or for other good cause, the court, at the time of appointment of a guardian for the minor or later, on its own or on motion of the minor or other interested person, may create a limited guardianship by limiting the powers otherwise granted by

this article to the guardian. Following the same procedure, the court may grant additional powers or withdraw powers previously granted.
(4) The court, as part of an order appointing a guardian for a minor, shall state rights retained by any parent of the minor, which may include contact or visitation with the minor, decision-making regarding the minor's health care, education, or other matter, or access to a record regarding the minor.
(5) An order granting a guardianship for a minor must state that each parent of the minor is entitled to notice that:
(a) The location of the minor's residency has changed;
(b) The court has modified or limited the powers of the guardian; or
(c) The court has removed the guardian.

Guardian's oath. The Guardian must take an oath and the clerk must issue letters of guardianship.

MISS. CODE ANN MISS. CODE ANN. § 93-20-108. Oath of Guardian.
The oath to be taken by the guardian is not prescribed in the statute. The oath is similar to that required under the old laws, and requires the guardian to swear or affirm that they will "faithfully discharge the duties of guardian or conservator of the ward according to law."

Certificate of attorney and fiduciary. MISS. CODE ANN . MISS. CODE ANN. § 93-20-108(2): The clerk must issue letters of guardianship to a guardian who takes the proper oath, posts bond if required, and submits a certificate of attorney and certificate of fiduciary, unless waived by the court.

Limited Guardianship: The guardianship may be limited to less than all the enumerated powers of a guardian.

MISS. CODE ANN. § 93-20-108(5)
The court may limit or restrict the powers of the guardian to less than all powers available under this chapter. Limitations on the powers of a guardian or conservator or on the property subject to conservatorship must be stated in the letters of guardianship or conservatorship.
Appointment of Guardian and Conservator may be in the same Order.

Retaining counsel. The Act does not require a guardian to retain counsel of record if it would impose an "undue burden" on the ward's estate.

MISS. CODE ANN MISS. CODE ANN. § 93-20-201(3).
"(3) The guardian for a minor is not required to retain an attorney of record for the guardianship if the courts finds that this would impose an undue burden on the ward's estate."

The chancellor may waive the requirement of the guardian having counsel.
Uniform Rules of Chancery Court, 6.01:
The GAP Act does not require a Petitioner to have counsel of record. Rule 6.01 of the Uniform Rules of Chancery Court Practice generally requires every fiduciary in a probate proceeding to have counsel of record "to provide representation, advice and assistance during the entire term of

the fiduciary's appointment." Rule 6.01(a). However, Rule 6.01(f) has been added to provide this alternative: "The chancellor may relieve a fiduciary of the obligation to retain an attorney in matters involving guardianship (of the person only), and in cases where the court finds that it will impose an undue or unnecessary financial burden on the ward's estate. All other duties of a fiduciary remain the same with or without representation."

Comment: The guardian may proceed pro se, but will still be bound to adhere to all terms and conditions, including the reporting requirements required under the Act.

Duties of guardian: The person appointed as guardian is empowered to make decisions with respect to the personal affairs of the ward. MISS. CODE ANN. § 93-20-102(h). The guardian is a fiduciary who has all the obligations of a parent to provide the minor with food, clothing, shelter, medical care, education, and to otherwise protect the best interest of the minor. In addition, the guardian has reporting requirements to advise the court about the welfare of the minor. Depending on the terms of the guardianship, the chancellor may also provide visitation rights for the parents, or authority to make decisions for the minor in some areas, which the guardian will be required to honor. MISS. CODE ANN. § 93-20-206(4).

MISS. CODE ANN. § 93-20-208. Duties of guardian for minor.
(1) A guardian for a minor is a fiduciary. Except as otherwise limited by the court, a guardian for a minor has the duties and responsibilities of a parent regarding the minor's support, care, education, health, safety, and welfare. A guardian must act in the minor's best interest and exercise reasonable care, diligence, and prudence.
(2) A guardian for a minor must:
(a) Become personally acquainted with the minor and maintain sufficient contact with the minor to know and report to the court the minor's abilities, limitations, needs, opportunities, and physical and mental health;
(b) Take reasonable care of the minor's personal effects and bring a proceeding for a conservatorship if necessary to protect other property of the minor;
(c) Expend funds of the minor that have been received by the guardian for the minor's current needs for support, care, education, health, safety, and welfare;
(d) Conserve any funds of the minor not expended under paragraph (c) for the minor's future needs, but if a conservator is appointed for the minor, pay the funds as directed by the court to the conservator to be conserved for the minor's future needs;
(e) Report the condition of the minor and account for funds and other property of the minor in the guardian's possession or subject to the guardian's control, as required by court rule or ordered by the court on application of a person interested in the minor's welfare;
(f) Inform the court of any change in the minor's dwelling or address; and
(g) In determining what is in the minor's best interest, take into account the minor's preferences to the extent actually known or reasonably ascertainable by the guardian.

Comment: No minimum age of the minor is specified for considering the minor's preference in subsection (h), and it appears that the guardian must take the minor's preference into account "to the extent actually known or reasonably ascertainable."

Powers of the guardian. The guardian is authorized to take custody of the minor, establish a residence, and provide for support, care, education, health, safety and welfare, and apply for any benefits or other resources payable for the minor's support. This includes filing an action for child support. The guardian may consent to medical treatment that the minor needs, and may consent to adoption of the minor.

MISS. CODE ANN. § 93-20-209. Powers of guardian for minor.
(1) Except as otherwise limited by court order, a guardian of a minor has the powers a parent otherwise would have regarding the minor's support, care, education, health, safety, and welfare.
(2) Except as otherwise limited by court order, a guardian for a minor may:
(a) Apply for and receive funds up to the amount set forth in Section 93-20-431 and benefits otherwise payable for the support of the minor to the minor's parent, guardian, or custodian under a statutory system of benefits or insurance or any private contract, devise, trust, conservatorship, or custodianship.
(b) Unless inconsistent with a court order entitled to recognition in this state, take custody of the minor and establish the minor's place of dwelling and, on authorization of the court, establish or move the minor's dwelling outside this state.
(c) If the minor is not subject to conservatorship, commence a proceeding, including an administrative proceeding, or take other appropriate action to compel a person to support the minor or make a payment for the benefit of the minor;
(d) Consent to health or other care, treatment, or service for the minor; or
(e) To the extent reasonable, delegate to the minor responsibility for a decision affecting the minor's well-being.
(3) The court may authorize a guardian for a minor to consent to the adoption of the minor if the minor does not have a parent.
(4) A guardian for a minor may consent to the marriage of the minor if authorized by the court.

IV. SUPPORT FROM PARENTS

A guardian may seek support from a child's parents. The GAP Act provides for support actions, which could be filed under 93-11-65.

MISS. CODE ANN. § 93-20-209. Powers of guardian for minor.
(1) Except as otherwise limited by court order, a guardian of a minor has the powers a parent otherwise would have regarding the minor's support, care, education, health, safety, and welfare.
(2) Except as otherwise limited by court order, a guardian for a minor may:
. . . .
(c) If the minor is not subject to conservatorship, commence a proceeding, including an administrative proceeding, or take other appropriate action to compel a person to support the minor or make a payment for the benefit of the minor;

V. PARENT'S ACTION TO TERMINATE THIRD-PARTY CUSTODY

A minor or "any party" may petition to terminate a guardianship. Notice must be given to the minor if over 14, the guardian, the parents, and any other person the court determines should receive notice. The guardianship may be terminated if the standards in Section 93-20-201 are no longer met. (Section 93-20-201 states that a guardian may be appointed when a parent is unable or unwilling to care for a child). However, the court need not terminate the guardianship even if Section 201 standards are not satisfied, unless the court finds that termination would be harmful to the minor; AND the **minor's interest** in the continuation of the guardianship outweighs the interest of any parent of the minor in restoration of the parent's right to make decisions for the minor. A guardianship of a minor automatically terminates on the minor's death, adoption, emancipation, attainment of majority, or on a date set by the court.

This standard for termination requires findings that the biological parent is withdrawing their consent to the guardianship, or that the parent is no longer "unwilling or unable" to care for the child. However, even if the parent asserts that they want to resume their parental responsibilities, the court must also find that termination of the guardianship would be in "minor's interest." This does not required a showing of material change in circumstances as required in custody modifications, but it sound similar to the alternate standard articulated in *Riley v. Doerner*, 677 So.2d 740, 744 (Miss. 1996), where the Court held that "when the environment provided by the custodial parent is found to be adverse to the child's best interest, and that the circumstances of the non-custodial parent have changed such that he or she is able to provide an environment more suitable than that of the custodial parent, the chancellor may modify custody accordingly. This would not seem to require a traditional *Albright* analysis, but *Albright* factors may be relevant to address this issue.

MISS. CODE ANN. § 93-20-210. Removal of guardian for minor; termination of guardianship; appointment of successor.

(1) Guardianship for a minor under this chapter terminates:
(a) On the minor's death, adoption, emancipation, attainment of majority, or on a date set by the court; or
(b) When the court finds that the standard in Section 93-20-201 for appointment of a guardian is not satisfied, unless the court finds that:
(i) Termination of the guardianship would be harmful to the minor; and
(ii) The minor's interest in the continuation of the guardianship outweighs the interest of any parent of the minor in restoration of the parent's right to make decisions for the minor.
(2) A ward or any party may petition the court to terminate the guardianship, modify the guardianship, remove the guardian and appoint a successor guardian.
(3) A petitioner under subsection (2) must give notice of the hearing on the petition to the minor, if the minor is fourteen (14) years of age or older and is not the petitioner, and to the guardian, each parent of the minor, and any other person the court determines.
(4) Not later than thirty (30) days after appointment of a successor guardian for a minor, notice must be given of the appointment to the ward, if the minor is fourteen (14) years of age or older, to each parent of the minor, and to any other person the court determines.
(5) When terminating a guardianship for a minor under this section, the court may issue an order providing for transitional arrangements that will assist the minor with a transition of custody and that is in the best interest of the minor. (6) A guardian for a minor who is removed must

cooperate with a successor guardian to facilitate transition of the guardian's responsibilities and protect the best interest of the minor.

VI. COMPENSATION

Compensation. The court may award the guardian reasonable compensation from the property of the ward for services as guardian, and reimbursement for room, board, clothing, and other appropriate expenses advanced for the benefit of the ward. A guardian or conservator need not use their own personal funds for the expenses of the ward. This provision allows the court to make monetary awards when the minor has available assets or resources. However, if a third party wants to establish a guardianship over a minor child who has no assets, there are no public funds available for such reimbursement, unless the child has been taken into custody by the Department of Child Protection Services through a Youth Court proceeding. The guardian may initiate a child support enforcement action against a parent to receive "benefits otherwise payable for the support of the minor." Miss. Code Ann. § 93-20-209(2(a).

MISS. CODE ANN. § 93-20-119.

1) Subject to court approval, a guardian may be awarded reasonable compensation for services as guardian and to reimbursement for room, board, clothing, and other appropriate expenses advanced for the benefit of the ward. If a conservator other than the guardian or a person affiliated with the guardian is appointed for the ward, reasonable compensation and reimbursement to the guardian may be approved and paid by the conservator in the discretion of the court.

(2) Subject to court approval, a conservator may be awarded reasonable compensation for services and reimbursement for appropriate expenses from the property of the ward in the discretion of the court.

(3) In determining reasonable compensation for a guardian or conservator, the court shall consider:

(a) The necessity and quality of the services provided;

(b) The experience, training, professional standing, and skills of the guardian or conservator;

(c) The difficulty of the services performed, including the degree of skill and care required;

(d) The conditions and circumstances under which a service was performed, including whether the service was provided outside regular business hours or under dangerous or extraordinary conditions;

(e) The effect of the services on the ward;

(f) The extent to which the services provided were or were not consistent with the guardian's plan under Section 93-20-315 or conservator's plan under Section 93-20-419; and

g) The fees customarily paid to a person that performs a like service in the community.

(4) A guardian or conservator need not use personal funds of the guardian or conservator for the expenses of the ward.

(5) If a ward seeks to modify or terminate the guardianship or conservatorship or remove the guardian or conservator, the court may order compensation to the guardian or conservator for time spent opposing modification, termination, or removal only to the extent the court determines the opposition was reasonably necessary to protect the interest of the ward.

Compensation for attorneys: The court may award reasonable compensation to attorneys representing respondents, or who provide services that result in an order beneficial to the ward. If a Petition is filed "in bad faith," the court may assess costs and attorney's fees as the court may deem appropriate.

MISS. CODE ANN. § 93-20-118.
1) An attorney for a respondent in a proceeding under this chapter may be awarded reasonable compensation for services and reasonable expenses in the discretion of the court.
(2) An attorney or other person whose services resulted in an order beneficial to a ward may be awarded reasonable compensation for services and reasonable expenses in the discretion of the court.
(3) The court must approve compensation and expenses payable under this section before payment. Approval is not required before a service is provided or an expense is incurred.
(4) If the court dismisses a petition under this chapter and determines the petition was filed in bad faith, the court may assess any costs and attorney's fees the court deems appropriate.

VII. OTHER ISSUES

A. Notice of hearings

Notice of hearings. When "notice" is required under the new Act, this may be provided pursuant to Rule 5, MRCP.

MISS. CODE ANN. § 93-20-113. NOTICE OF HEARING GENERALLY.
(1) Except as otherwise provided in Section 93-20-203, 93-20-303(3) or 93-20-403(3), if notice of a hearing under this chapter is required, the movant must give notice under Rule 5 of the Mississippi Rules of Civil Procedure of the date, time, and place of the hearing to the person to be notified unless otherwise ordered by the court for good cause shown.
[DELETED: The original requirement that a Rule 81 summons was required for all notice.]
(2) Proof of notice given of a hearing under this chapter must be made before or at the hearing and filed in the proceeding.
(3) Notice given of a hearing under this chapter must be in at least sixteen-point font, in plain language, and, to the extent feasible, in a language in which the person to be notified is proficient.
(4) Any person interested in the ward's welfare may file a motion to intervene as provided by Rule 24 of the Mississippi Rules of Civil Procedure.

Persons entitled to notice. MISS. CODE ANN. § 93-20-203(2) requires that notice under Rule 5, MRCP must be provided to "any other person the court determines should know of the proceedings."

Comment. The question is when/how does the trial court make this determination about "other persons" who should be notified of the hearing date in the summons.

B. Certificates

The GAP Act does not specify or explain the content or form for the "certificates" that are required from the attorney and the fiduciary. The 11th Chancery District has suggested forms on their web site which was last accessed on June 6, 2020 at http://www.11chancery.com/forms. These forms are set forth below:

"CERTIFICATE OF ATTORNEY"
"I, _____, attorney for fiduciary _____, in this cause, do certify as an officer of this Court and member in good standing with the Mississippi State Bar Association, that I have explained the duties and obligations as set forth in the Certificate of Fiduciary required of my client(s) as fiduciary in this action.
Respectfully Submitted, this the ___ day of _____.
Signature of Attorney: _____
Printed Name of Attorney: _____
Bar No.: _____"

"CERTIFICATE OF FIDUCIARY"
"I, _____, fiduciary in this cause, have hereby read, understand, and agree to the following:
1. I understand that I, as fiduciary, am required to not receive any personal benefit and to protect and preserve the funds owned by the Ward/Estate/Decedent, who is the person over whom I have charge.
2. I will not use any funds or make expenditures of the Ward's funds without prior Court approval except as otherwise provided by law or Court approval.
3. I understand that the Court can and will find me in contempt if it is proven that I have violated any of this Court's order(s) and that appropriate sanctions will be levied by the Court for any violations.
4. I agree and understand that I must consult with my attorney on any extraordinary expenditure prior to making said expenditure in order to gain appropriate legal advice and court approval regarding those transactions.
5. I understand that unless waived by the Court in advance, I will be required to submit formal, annual accountings and reports to the Court reflecting the well-being and/or expenditures of the Ward's/Estate's/Decedent's funds as required by law in acting as guardian/conservator.
6. My current address and phone numbers are as follows, and I understand that in the event this information changes, I must provide that information to the Clerk of this Court in writing.
NAME: _____
ADDRESS: _____
CITY, STATE, ZIP: _____
PHONE NO. _____
EMAIL ADDRESS: _____
7. I have discussed with my attorney the duties and responsibilities required of my office as fiduciary and as set forth in this document, and I hereby agree to be bound by them.

Respectfully Submitted, this the_____ day of _____.

_____
Signature of Fiduciary"

SWORN ACKNOWLEDGMENT
STATE OF MISSISSIPPI
COUNTY OF _____

This day personally appeared before me, the undersigned authority at law in and for the jurisdiction aforesaid, the within named _____, who having been by me first duly sworn, states on oath that the matters and facts set forth in the above Certificate of Fiduciary are true and correct as therein stated.

_____
FIDUCIARY

SWORN TO AND SUBSCRIBED BEFORE ME, this the ___ day of__ __, 20__.

_____
NOTARY PUBLIC

MY COMMISSION EXPIRES: _____

C. Other issues

1. Guardianship and Conservatorship can be filed in a single proceeding, and same person can be appointed. If filed separately, actions can be consolidated.
MISS. CODE ANN. § 93-20-107. PRACTICE IN COURT.

2. Transition provisions.
MISS. CODE ANN. § 93-20-125.
Except as otherwise provided in this chapter:
(a) This chapter applies to all guardianship and conservatorship proceedings commenced on or after January 1, 2020;
(b) This chapter applies to all guardianship and conservatorship proceedings commenced before January 1, 2020, unless the court, in its discretion, determines that the superseded law should apply. The requirements of this chapter providing for increased court oversight and periodic monitoring do not require that a new proceeding be commenced;and
(c) An act done before January 1, 2020, is not affected by this chapter.

Comment: The amendment removed the requirement that the chancellor find that applying the new law would impose a substantial hardship on the estate.

3. No personal liability of guardian.
MISS. CODE ANN. § 93-20-120. A guardian or conservator is not personally liable for an act or omission of the ward.

4. Guardian may petition for instruction or ratification.
MISS. CODE ANN. § 93-20-121.
A guardian or conservator may petition the court for instruction concerning fiduciary responsibility or ratification of a particular act related to the guardianship or conservatorship.

5. Third Party Acceptance.
MISS. CODE ANN. § 93-20-122.
(1) A person may choose to not recognize the authority of a guardian or conservator to act on behalf of a ward if:
(a) The person has actual knowledge or a reasonable belief that the letters of guardianship or conservatorship are invalid or the conservator or guardian is exceeding or improperly exercising authority granted by the court; or
(b) The person has actual knowledge that the ward is subject to physical or financial abuse, neglect, exploitation, or abandonment by the guardian or conservator or a person acting for or with the guardian or conservator.
(2) A person may refuse to recognize the authority of a guardian or conservator to act on behalf of a ward if:
(a) The guardian's or conservator's proposed action would be inconsistent with this chapter; or
(b) The person makes, or has actual knowledge that another person has made, a report to a government agency providing protective services to adults or children stating a good-faith belief that the ward is subject to physical or financial abuse, neglect, exploitation, or abandonment by the guardian or conservator or a person acting for or with the guardian or conservator.
(3) A person that refuses to accept the authority of a guardian or conservator in accordance with subsection (2) may report the refusal and the reason for refusal to the court. The court on receiving the report shall consider whether removal of the guardian or conservator or other action is appropriate.
(4) A guardian or conservator may petition the court to require a third party to accept a decision made by the guardian or conservator on behalf of the ward.

6. A Foreign Guardianship Order may be registered and enforced in Mississippi.
MISS. CODE ANN. § 93-20-124.
(1) If a guardian has been appointed in another state for an individual, and a petition for guardianship for the individual is not pending in this state, the guardian appointed in the other state, after giving notice to the appointing court, may register the guardianship order in this state by filing certified copies of the order and letters of guardianship as a foreign judgment in a court of an appropriate county of this state.
(2) If a conservator has been appointed in another state for an individual, and a petition for conservatorship for the individual is not pending in this state, the conservator appointed for the individual in the other state, after giving notice to the appointing court, may register the conservatorship in this state by filing certified copies of the order of conservatorship, letters of conservatorship, and any bond or other asset-protection arrangement required by the court as a foreign judgment in a court of a county in which property belonging to the individual is located.
(3) Upon registration under this section of a guardianship or conservatorship order from another state, the guardian or conservator may exercise in this state all powers authorized in the order except as prohibited by this chapter and law of this state other than this chapter. If the guardian or conservator is not a resident of this state, the guardian or conservator may maintain an action

or proceeding in this state subject to any condition imposed by this state on an action or proceeding by a nonresident party.
(4) The court may grant any relief available under this chapter and law of this state other than this chapter to enforce an order registered under this section.

7. UCCJEA, UAGPPJA and UVGA remain in force.
MISS. CODE ANN. § 93-20-104.
The Uniform Child Custody Jurisdiction and Enforcement Act (MISS. CODE ANN. § 93-27-101, et seq.) and the Uniform Adult Guardianship and Protective Proceedings Jurisdiction Act (MISS. CODE ANN. § 93-14-101, et seq.) remain in force.

MISS. CODE ANN. § 93-20-107(3).
If the court finds that a provision of this chapter conflicts with any portion of the Uniform Veterans' Guardianship Law (MISS. CODE ANN. § 35-5-1, et seq.), the court must resolve the conflict in the best interest of the ward..

8. Law and equity.
MISS. CODE ANN. § 93-20-103.
Unless displaced by a particular provision of this chapter, the principles of law and equity apply.